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Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 44

PROPERTY

VOLUME 31

Chap.

1. General Provisions, 44-1-1 through 44-1-17.

2. Recordation and Registration of Deeds and Other Instruments, 44-2-1 through 44-2-253.

3. Regulation of Specialized Land Transactions, 44-3-1 through 44-3-250.

4. Determination of Boundaries, 44-4-1 through 44-4-31.

5. Acquisition and Loss of Property, 44-5-1 through 44-5-230.

6. Estates, 44-6-1 through 44-6-206.

7. Landlord and Tenant, 44-7-1 through 44-7-103.

VOLUME 32

10. Historic Preservation, 44-10-1 through 44-10-31.

12. Rights in Personalty, 44-12-1 through 44-12-322.

13. Exemptions from Levy and Sale, 44-13-1 through 44-13-120.

14. Mortgages, Conveyances to Secure Debt, and Liens, 44-14-1 through 44-14-613.

15. Uniform Prudent Management of Institutional Funds, 44-15-1 through 44-15-8.

16. Uniform Environmental Covenants, 44-16-1 through 44-16-14.

Law reviews. — For article, "The Right to Include," see 63 Emory L.J. 857 (2014).

CHAPTER 8

WATER RIGHTS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Unreasonable Alteration of Surface Drainage, 6 POF2d 301.

Interference with Use of Senior Well — Withdrawal from Common Aquifer, 8 POF2d 515.

Citizens' Suits under the Safe Drinking Water Act, 67 POF3d 95.

Proof of Accretion or Avulsion in Title and Boundary Disputes over Additions to Riparian Land, 73 POF3d 167.

44-8-1. Ownership of running water; right to divert or adulterate water.

Law reviews. — For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004). For article, "Special Challenges to Water Markets in Riparian States," see 21 Ga. St. U.L. Rev. 305 (2004).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24B Am. Jur. Pleading and Practice Forms, Waters, § 6.

44-8-5. Rights of adjoining landowners in navigable streams.

JUDICIAL DECISIONS

O.C.G.A. § 44-8-5 is not applicable to tidal waters.

O.C.G.A. §§ 44-8-5 and 44-8-7 did not give a couple a superior right over their neighbor to construct a dock over the marshland opposite their property. O.C.G.A. § 44-8-5 did not apply to tidewaters, such as the marshland at issue here, and under O.C.G.A. § 44-8-7, the state retained fee simple title to the foreshore in all navigable tidewaters. Kelso v. Baxter, 292 Ga. App. 663, 665 S.E.2d 381 (2008), cert. denied, 2008 Ga. LEXIS 917 (Ga. 2008).

44-8-7. Rights of owners of land adjacent to or covered by navigable tidewaters.

JUDICIAL DECISIONS

ANALYSIS

RIGHTS TO TIDAL WATERS

Rights to Tidal Waters

Statute did not provide right to construct dock over marshland. — O.C.G.A. §§ 44-8-5 and 44-8-7 did not give a couple a superior right over their neighbor to construct a dock over the marshland opposite their property. Section 44-8-5 did not apply to tidewaters,

such as the marshland at issue here, and under § 44-8-7, the state retained fee simple title to the foreshore in all navigable tidewaters. Kelso v. Baxter, 292 Ga. App. 663, 665 S.E.2d 381 (2008), cert. denied, 2008 Ga. LEXIS 917 (Ga. 2008).

44-8-10. Construction or establishment of private bridge or ferry; grant of franchise to construct or operate public bridge or ferry; compensation to landowner for interference with possession; when franchise exclusive generally; exclusive franchises pertaining to streets or sidewalks.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 12 Am. Jur. Pleading and Practice Forms, Ferries, § 3.

CHAPTER 9

EASEMENTS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Abandonment of Easement, 3 POF2d 647.

Intent to Create Negative Easement, 5 POF2d 621.

Wrongful Interference with Right of Way, 32 POF2d 389.

Extent of Easement over Servient Estate, 33 POF2d 669.

Establishment of Private Prescriptive Easement, 2 POF3d 125, 197.

Easements — Existence of Way of Necessity, 11 POF3d 601.

Proof of Intent to Abandon Easements, 53 POF3d 519.

Grantor's Intent to Create Reciprocal Negative Easement by Common Development Scheme of Subdivision, 62 POF3d 1.

Permissive Possession or Use of Land as Defeating Claim of Adverse Possession or Prescriptive Easement, 68 POF3d 239.

Proof of Adjoining Landowner's Malicious or Unreasonable Construction of Fence, 73 POF3d 1.

Proof of Extent of Easement of Way Created by Express Grant or Reservation, 81 POF3d 199.

ARTICLE 1

IN GENERAL

44-9-1. Methods of acquiring private ways.

Law reviews. — For annual survey of real property law, see 56 Mercer L. Rev. 395 (2004). For annual survey of zoning and land use law, see 58 Mercer L. Rev. 477 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
GRANT
PRESCRIPTION
2. REQUIREMENTS
4. INTERFERENCE AND OBSTRUCTIONS
IMPLICATION

General Consideration

Cited in Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709 (2011).

Grant

Adequate description of easement found. — Partial summary judgment in favor of the lot owners was affirmed as, although the record did not contain a plat showing property designated as "Area #6," the description in a conveyance to a homeowners' association as "located between Lot No. 77, Lake George, and Pine Avenue, including causeway to the creek, near the railroad bridge, known as the headwaters of the Gress River" disclosed with sufficient certainty the location of the lot owners' easement; moreover, all the parties described the 1.542 acres eventually conveyed to the property owner contesting the easement as "Area # 6." Wynns v. White, 273 Ga. App. 209, 614 S.E.2d 830 (2005).

Because the deed of certain landowners incorporated a recorded plat's reservation of a 1.32 acre strip of the landowners' property to be used for access to the neighbor's property, and because the plat was recorded, the landowners were deemed to have been on notice of that reservation and took title subject to the easement described therein; since there was nothing ambiguous or unclear about the location or the nature of the use of the 1.32 acre strip of land, the trial court did not err by declaring a judgment in favor of the neighboring property owner. Hernandez v. Whittemore, 287 Ga. App. 251, 651 S.E.2d 180 (2007).

Prescription

2. Requirements

Easement and right of way. — In a dispute over a landowners' patio built on a neighbor's land and use of a roadway over the neighbor's land, the patio did not create a prescriptive right of way as the patio was not a road or path and the bottom part of the road was not taken by adverse possession as mere use was not notice of an adverse claim; however, as the landowner might have met the time and notice requirements to obtain a right of way by prescription for the top part of the road, summary judgment was not proper on that point. Moody v. Degges, 258 Ga. App. 135, 573 S.E.2d 93 (2002).

Use of driveway and railroad crossing. — Trial court properly awarded a property owner compensatory damages in an inverse condemnation suit against the Georgia Department of Transportation (DOT) because the property owner established the acquisition of a prescriptive easement over the driveway and railroad crossing at issue and, thus, had a compensable property interest as a result of DOT closing the driveway. Ga. Dep't of Transp. v. Jackson, 322 Ga. App. 212, 744 S.E.2d 389 (2013).

Failure to establish prescriptive rights. — Trial court properly granted summary judgment to a neighbor in a trespass action that involved use of a roadway to gain access to a marsh area as the defending neighbors failed to show prescriptive rights to the roadway were obtained since there was no evidence in the record indicating that the defending neighbors maintained the roadway during any seven year period in any manner; the record established that the roadway was too wide to function as a private right of way; and even if the defending neighbors had obtained a parol license to use the roadway, such license was still revocable. Warner v. Brown, 290 Ga. App. 510, 659 S.E.2d 885 (2008).

In a declaratory judgment action

brought by adjoining landowners seeking rights to access an undeveloped lot in a subdivision for use as a soccer field, the trial court properly granted summary judgment to the property owners who had terminated the access and use of the adjoining landowners to the field. There existed no express easement to grant the adjoining landowners access, no dedication of the field was established for public use, the treatment of the field for fire ants was merely maintenance, and since the adjoining landowners had previously used the lot with permission, no prescriptive rights were established. De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244 (2008).

4. Interference and Obstructions

Showing required to sustain application for removal of obstructions from private way based upon prescription.

Because the record contained no evidence that a neighboring landowner's predecessor in interest, or its agents, used the road continuously for at least 20 years, the predecessor did not acquire a private way by prescription and, hence, the neighbor lacked any private way by prescription over a landowner's property to clear timber and remove barbed wire from that roadway without committing a trespass. Norton v. Holcomb, 285 Ga. App. 78, 646 S.E.2d 94 (2007), cert. denied, 2007 Ga. LEXIS 654 (Ga. 2007).

Implication

Property accessible only through easement. — In a dispute over a driveway easement between a landowner and a couple, the trial court properly granted the landowner an interlocutory injunction. Even if the landowner's deed had not incorporated by reference a plat that showed the easement, it was critical that the landowner's property could be accessed only through the easement, which gave rise to an easement by implication. Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800 (2008), cert. denied, No. S09C0581, 2009 Ga. LEXIS 187 (Ga. 2009); cert. denied, 558 U.S. 1123, 130 S. Ct. 1077, 175 L. Ed. 2d 903 (2010).

Proof inadequate for determination. — Trial court erred in granting summary judgment, pursuant to O.C.G.A. § 9-11-56, to a property owner who sought an easement by implication of law pursuant to O.C.G.A. § 44-9-1 over adjoining property owners' land, as the record was insufficient to support such a determination; the parties' accounts of how the land was divided upon foreclosure from the original grantor differed greatly and there were no deeds, deed assignments, dates, or foreclosure information provided in the record in order to properly determine if such an easement was created. Boyer v. Whiddon, 264 Ga. App. 137, 589 S.E.2d 709 (2003).

Implied easement not established. — Implied easement for a driveway leading to an owner's home across the neighbors' property was not established because access to the owner's home across the neighbors' property was unnecessary, but merely convenient, and because the owner's deed made no mention of a plat allegedly relied on by the owner or a right of way bordering the property, and the plat itself was not recorded. Eardley v. McGreevy, 279 Ga. 562, 615 S.E.2d 744 (2005).

In determining when a common owner had conveyed land to the defendants and to another landowner, the trial court erred in using the date of recording, not the date of the conveyance; thus, no implied easement of necessity could exist across the defendants' property for the benefit of the other landowner, and when the common owners sold the property to the other landowner they no longer owned the land now belonging to the defendants, and thus could not convey an easement across land in which they owned no interest. Burnette v. Caplan, 287 Ga. App. 142, 650 S.E.2d 798 (2007).

Owner of property adjacent to a bankruptcy debtor's private airport did not have an implied easement of necessity to use the airport since the owner had ingress and egress to the owner's property by use of driveways and roads not owned by the debtor. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808 (Bankr. N.D. Ga. 2013).

RESEARCH REFERENCES

ALR. — What constitutes, and remedies for, misuse of easement, 111 ALR5th 313.

44-9-3. Right of lateral support from adjoining land; right to make excavations up to boundary line; notice to adjoining landowner; standard of care.

JUDICIAL DECISIONS

Summary judgment on duty of lateral support not authorized. — Because the appellees held prescriptive title by adverse possession to that part of the alleyway located between the parties' properties and were not required to remove the terraces and construction debris from the alleyway, the appellants were not entitled to summary judgment on the appellants claim seeking a declaration that the appellants would have no duty of lateral support once the terraces and debris were removed. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858 (2014).

Applicability. — Appellate court failed to discern how O.C.G.A. § 44-9-3(a) had anything to do with the maintenance of a dam to preserve a lake, and declined the landowners' invitation to extend the statutory interpretation. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19A Am. Jur. Pleading and Practice Forms, Party Walls, § 3.

44-9-4. Parol license; when revocable; when easement running with land.

Law reviews. — For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

O.C.G.A. § 44-9-4 is operative only where there is an express oral license.

It was error to hold that the defendant had an irrevocable license to use a curb cut under O.C.G.A. § 44-9-4; it was undisputed that the trustees of the trust that owned the land in question never granted the defendant an express oral license to use the curb cut, and at most the defendant had an implied license, to which O.C.G.A. § 44-9-4 did not apply. Postnieks v. Chick-fil-A, Inc., 285 Ga. App. 724, 647 S.E.2d 281 (2007).

License not made irrevocable by mere expenditures upon improvements to enjoy license.

Trial court properly granted summary judgment to a neighbor in a trespass action that involved use of a roadway to gain access to a marsh area as the defending neighbors failed to show prescriptive rights to the roadway were obtained since there was no evidence in the record indi-

cating that the defending neighbors maintained the roadway during any seven year period in any manner; the record established that the roadway was too wide to function as a private right of way; and even if the defending neighbors had obtained a parol license to use the roadway, such license was still revocable despite the expenditure of funds to build a dock. Warner v. Brown, 290 Ga. App. 510, 659 S.E.2d 885 (2008).

License becomes irrevocable when licensee erects necessary valuable improvements.

Because a lessee had a license concerning a sign on its leased property, made improvements in reliance of the lease, and a second lessee took ownership of the property with actual notice of the sign, the trial court abused its discretion in denying the lessee an interlocutory injunction barring the second lessee from interfering with the sign, as the license became irrevocable; moreover, the fact that the lessee did not own the land in which the sign was located was irrelevant. Lowe's Home Ctrs., Inc. v. Garrison Ridge Shopping Ctr. Marietta, GA, L.P., 283 Ga. App. 854, 643 S.E.2d 288 (2007).

Executed parol license, where expenses have been incurred, ripens into easement running with the land.

Trial court properly granted a corporation's summary judgment motion and awarded a corporation injunctive relief, barring an owner from interfering with the corporation's right of access to a highway, as the corporation's predecessor improved property on which it held a parol license, which created an easement that ran with the land under O.C.G.A. § 44-9-4, and which passed to the corporation. Blake v. RGL Assocs., Inc., 267 Ga. App. 709, 600 S.E.2d 765 (2004).

Parol license could be revoked.

Evidence supported a finding that a lot owner had abandoned any interest the lot owner had in an unused alley: the alley was unused since the 1970s, a neighboring owner improved the alley and blocked the alley's use in 1991, the owner consented to the improvements and supported a re-zoning plan that included fencing, and did not object until 2001. Even if an oral license was granted, such a license was revocable at any time. Donald Azar, Inc. v. Muche, 326 Ga. App. 726, 755 S.E.2d 266 (2014).

Easement found to be acquired.

Trial court erred by granting a guitar store summary judgment in a suit brought by a diving store to enforce an easement because there was no genuine issue of fact that the guitar store's predecessor in interest had granted the diving store a license to maintain the sign at issue on the guitar store's property in writing and money was paid, thus, the license created thereby ran with the land. Aquanaut Diving & Eng'g, Inc. v. Guitar Ctr. Stores, Inc., 324 Ga. App. 570, 751 S.E.2d 175 (2013).

Easement by estoppel. — There was no merit to the argument that Georgia law did not recognize the concept of easement by estoppel. The ripening of a license under O.C.G.A. § 44-9-4 into an easement because of the expenditure of funds in reliance thereon had often been described as an application of the doctrine of equitable estoppel. Waters v. Ellzey, 290 Ga. App. 693, 660 S.E.2d 392 (2008).

Easement not acquired.

Under O.C.G.A. § 44-9-4, a car wash owner did not show that a parol license to use a gas station's property for ingress and egress had ripened into an easement running with the land; there was no evidence that the car wash's lessor built any structure on the gas station's land or invested a substantial amount in improving the gas station's land, and there was no evidence of an express license granted to the car wash by the gas station. Decker Car Wash, Inc. v. BP Prods. N. Am., Inc., 286 Ga. App. 263, 649 S.E.2d 317 (2007), cert. denied, 2007 Ga. LEXIS 767 (Ga. 2007).

Marina did not acquire an irrevocable license to access a lake and erect a dock pursuant to O.C.G.A. § 44-9-4 because even assuming that the prior dock created an irrevocable license in favor of the prior property owner, the evidence failed to show that the marina's dock fell within the property covered by the alleged license; the prior dock fell into disrepair and was no longer in existence, and the dock the marina erected was not in the same location as the prior dock. Camp

Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

In a declaratory judgment action brought by adjoining landowners seeking rights to access an undeveloped lot in a subdivision for use as a soccer field, the trial court properly granted summary judgment to the property owners who had terminated the access and use of the adjoining landowners to the field. There existed no express easement to grant the adjoining landowners access, no dedication of the field was established for public use, the treatment of the field for fire ants was merely maintenance, and since the adjoining landowners had previously used the lot with permission, no prescriptive rights were established. De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244 (2008).

No oral license to use land found. — Since plaintiff pointed to no evidence of any express oral license, it followed that the trial court did not err in finding O.C.G.A. § 44-9-4 inapplicable. Parrott v. Fairmont Dev., Inc., 256 Ga. App. 253, 568 S.E.2d 148 (2002).

Trial court erred by not finding parol license. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

44-9-6. Loss of easement by abandonment or nonuse.

JUDICIAL DECISIONS

ANALYSIS

ABANDONMENT

Abandonment

Easement acquired by grant not lost unless clear and unequivocal intention to abandon.

In a dispute over an easement, although a fence blocked the roadway claimed by the appellees, the evidence did not constitute clear, unequivocal, and decisive evidence of an intent to abandon the easement as one of the appellees testified that the fence could be clipped and unclipped to travel on the easement; the other appellee gave undisputed testimony that the appellees and their family had made use of the easement ever since the appellees' father conveyed the easements in 1998, including to maintain the water lines that come from a spring and which provide water to Tract 1 as well as to access the barn/shed on the eastern end of Tract 1. Houston v. Flory, 329 Ga. App. 882, 766 S.E.2d 227 (2014).

Mere nonuse cannot constitute abandonment.

Trial court did not err in granting a directed verdict for the alleged trespasser in finding that platted subdivision road the alleged trespasser was using was a public road as the easement that existed on the road was acquired from the grantor; thus, evidence of nonuse of the road without a showing of an intent to abandon the easement meant the easement had not been abandoned. Hand v. Pettitt, 258 Ga. App. 170, 573 S.E.2d 421 (2002).

RESEARCH REFERENCES

ALR. — What constitutes, and remedies for, misuse of easement, 111 ALR5th 313.

ARTICLE 3

PRIVATE WAYS

44-9-40. Authority of superior court to grant private ways; filing of petition as declaration of necessity; when proceeding enjoined.

Law reviews. — For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cases of necessity do not arise except way sought is absolutely indispensable, etc.

Trial court's denial of a condemnation of easement action was affirmed as the trial court's finding of fact that two alternate routes existed to the landlocked property was not clearly erroneous, even though the owners of the landlocked property claimed that they could not get permission to use the two alternate routes. Blount v. Chambers, 257 Ga. App. 663, 572 S.E.2d 32 (2002).

Proof of necessity of private way.

Under statute that was in derogation of the common law, and, thus, was strictly construed, the filing of the condemnor's petition for a right of way across the condemnee's property was deemed to be a declaration of necessity, and, thus, the evidentiary hearing held in the trial court was not a trial and did not involve a final judgment; rather, the hearing was a show cause hearing that placed the burden on the condemnee to show why a right of way should not be granted based on the declaration of necessity put forth in the petition. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Owner was entitled to a condemnation of a private way of necessity under O.C.G.A. § 44-9-40(b) over the tip of the owner's triangle shaped lot, as the owner's only access to the lake front property was either by boat or by foot on a path of several hundred feet, which was unreasonable, the owner did not cause the lot to be landlocked, and there was no undue inconvenience to the condemnees, since a survey error caused the strange lot shape. Pierce v. Wise, 282 Ga. App. 709, 639 S.E.2d 348 (2006).

Because the evidence presented at trial made it clear that a lessor conveyed no ownership interest to a tenant, leaving that tenant with only a right to possess and use the leased property, and more specifically, a usufruct, the tenant did not own an interest in the property, and thus could not pursue an easement by necessity under O.C.G.A. § 44-9-40; hence, summary judgment in the lessor's favor as to this issue was upheld on appeal. Read v. Ga. Power Co., 283 Ga. App. 451, 641 S.E.2d 680 (2007).

Trial court erred in dismissing a property owner's statutory claim for an easement of necessity for failure to state a claim because the complaint sufficiently

General Consideration (Cont'd)

alleged that the owner had used a half mile of a private road on the defendant's land to access the owner's property since purchasing that land in 2006, that without such access, the owner had no legal means of ingress, and the owner had no ability to negotiate and acquire deeded fee simple title to roads to access the owner's property. S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498 (2014).

Property owner's allegations that the owner had used half a mile of a private road of the association's for years and that without such access the owner had no legal means of ingress and egress that would support the use of the property as rural residential was sufficient to state a claim for relief under O.C.G.A. § 44-9-40 and, thus, the trial court erred in dismissing the owner's claim for an easement of necessity. S-D Rira, LLC v. Outback Prop. Owners' Ass'n, No. A14A1307, 2014 Ga. App. LEXIS 813 (Nov. 21, 2014).

Failure of lessee to reserve easement. — Because genuine issues of material fact remained as to whether a lessee's failure to reserve an easement to the subject property at the time the lessee executed a corrective quitclaim deed was otherwise unreasonable, foreclosing the condemnation action, partial summary judgment to the lessee was unwarranted. Wright v. Brookshire, 286 Ga. App. 162, 648 S.E.2d 485 (2007).

Applicant seeking private way of necessity did not voluntarily landlock itself. — Because the evidence in the record failed to support the trial court's conclusion that a corporate landowner voluntarily landlocked itself, and no other evidence showed that granting a private way of necessity would be otherwise unreasonable, the trial court erred by denying the corporation's petition for condemnation of a private way of necessity over an existing private access easement. Dovetail Props. v. Herron, 287 Ga. App. 808, 652 S.E.2d 856 (2007).

Easement accorded with statute. — Trial court did not err in limiting an easement for ingress and egress down the center line of a street because the easement recognized accorded with the statutory private way easements that Georgia law allowed for such access to public roads under O.C.G.A. § 44-9-40. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Use of driveway and railroad crossing. — Trial court properly awarded a property owner compensatory damages in an inverse condemnation suit against the Georgia Department of Transportation (DOT) because the property owner established the acquisition of a prescriptive easement over the driveway and railroad crossing at issue and, thus, had a compensable property interest as a result of DOT closing the driveway. Ga. Dep't of Transp. v. Jackson, 322 Ga. App. 212, 744 S.E.2d 389 (2013).

Standing to pursue claim. — When plaintiff filed the plaintiff's second petition, the plaintiff had an existing right to cross over the lands of one of the defendants but the plaintiff still could not cross the other defendant's property, and the landlocked parcel was, therefore, still without a means of access, ingress, and egress. The lack of a "means of access, ingress, and egress" adequately established the standing of plaintiff to pursue a condemnation action. Canton Partners v. Scarbrough Group, Inc., 316 Ga. App. 57, 728 S.E.2d 733 (2012).

Cited in Norton v. Holcomb, 285 Ga. App. 78, 646 S.E.2d 94 (2007); Daniel v. Amicalola Elec. Mbrshp. Corp., 289 Ga. 437, 711 S.E.2d 709 (2011).

44-9-43. Show cause order; selection of assessors; hearing before assessors.

JUDICIAL DECISIONS

Condemnation procedure. — After the condemnor's petition for right of way was filed, the trial court, assuming the petition was properly served, had to enter an order requiring the condemnee to show cause why the easement for the private

way should not be condemned, and, thus, the trial court's evidentiary hearing was a show cause hearing, and neither a trial nor other proceeding involving a final judgment. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Selection of assessors. — Statutory procedure required that once the condemnee failed to show a right of way should not be granted out of necessity the court was required to submit the issue of compensation for such private way to a board of assessors named in the court's order approving the private way and the court followed that procedure by specifically naming two assessors for that purpose in its order. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

44-9-44. Appeals from award of assessors; jury trial.

JUDICIAL DECISIONS

Appeal from award of assessors. — Before a right of way could be granted, either the condemnee or condemnor had the right to appeal a board of assessor's award properly filed and recorded with the clerk of court; however, because the board of assessors did not file such an award, the 10-day time period for appealing a properly filed and recorded award did not start running, and, thus, the condemnor did not exhaust the appellate process and obtain a final judgment. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

44-9-46. Determination of amount of compensation and other issues by jury; payment and disposition of damages.

JUDICIAL DECISIONS

Determination of amount of compensation. — If condemnee filed an appeal to a jury after the Board of Assessors made its award, as the condemnee had a right to do, the trial court jury had the right to determine more than just the value of the right of way; it could also consider the issue of damages, if any, that the condemnee might have sustained. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

44-9-54. Establishment of private way by prescription — Generally.

JUDICIAL DECISIONS

ANALYSIS

APPLICABILITY
REQUIREMENTS

Applicability

Mere use of private railroad crossing not enough to acquire prescriptive rights. — Property owner's mere use of a private railroad crossing was not enough for the owner to acquire prescriptive rights pursuant to O.C.G.A. § 44-9-54 because no written agreement or easement from the railway existed concerning the private crossing; the owner admitted that the owner's use of the private crossing had been with the permission of the railway, the crossing had been repaired and maintained throughout by the railway, and the fact that the railway restored the crossing so that the owner could continue to use the crossing was evidence that the railroad permitted, rather than forbade, continued use of the

Applicability (Cont'd)

crossing. Yawn v. Norfolk S. Ry. Co., 307 Ga. App. 849, 706 S.E.2d 197 (2011).

Requirements

When use originates by permission, prescription runs upon notification of changed position.

Owner of property adjacent to a bankruptcy debtor's private airport did not have a prescriptive easement to use the airport since the owner's use of the airport was permissive and any repairs or maintenance to the airport were not substantial enough to serve as notice to the debtor of an adverse claim. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808 (Bankr. N.D. Ga. 2013).

If repair made by landowner's permission, no prescriptive right acquired.

Because an adjoining landowner's use and repair of a landowner's road began with permission, a special master's finding that the adjoining landowner never asked for permission and that the owners never objected to their activities from 1968 to 2008 was inadequate to establish the adverse notice necessary to establish an easement by prescription. McGregor v. River Pond Farm, LLC, 312 Ga. App. 652, 719 S.E.2d 546 (2011).

ARTICLE 4

RIGHTS OF WAY FOR MINING, QUARRYING, AND OTHER BUSINESSES

44-9-70. Rights of way for mining, quarrying, and other business — Method of obtaining.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17B Am. Jur. Pleading and Practice Forms, Mines and Minerals, § 2.

CHAPTER 10

HISTORIC PRESERVATION

Article 1

Uniform Conservation Easements

Sec.

44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability; encumbered property must be located within boundaries of locality holding easement.

ARTICLE 1

UNIFORM CONSERVATION EASEMENTS

44-10-1. Short title.

Law reviews. — For article, "A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements," 40 Ga. L. Rev. 85 (2005).

44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability; encumbered property must be located within boundaries of locality holding easement.

(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

(f) No county, municipality, or consolidated government shall hold a conservation easement unless the encumbered real property lies at least partly within the jurisdictional boundaries of such county, municipality, or consolidated government. (Code 1981, § 44-10-3, enacted by Ga. L. 1992, p. 2227, § 1; Ga. L. 1993, p. 91, § 44; Ga. L. 1993, p. 794, § 1; Ga. L. 2012, p. 257, § 3-2/HB 386.)

The 2012 amendment, effective January 1, 2013, added subsection (f). See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 257, § 7-1(e)/HB 386, not codified by the General Assembly, provides that the 2012 amendment shall be applicable to all taxable years beginning on or after January 1, 2013.

Ga. L. 2012, p. 257, § 7-1(h)/HB 386, not codified by the General Assembly, provides: "Tax, penalty, and interest liabilities and refund eligibility for prior taxable years shall not be affected by the passage of this Act and shall continue to be governed by the provisions of general law as it existed immediately prior to the effective date of the relevant portion of this Act."

Ga. L. 2012, p. 257, § 7-1(i)/HB 386, not codified by the General Assembly, provides: "This Act shall not abate any prosecution, punishment, penalty, administrative proceedings or remedies, or civil action related to any violation of law committed prior to the effective date of the relevant portion of this Act."

Ga. L. 2012, p. 257, § 7-2/HB 386, not codified by the General Assembly, provides for severability.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 112 (2012).

ARTICLE 2

ORDINANCES PROVIDING FOR HISTORICAL PRESERVATION

44-10-20. Short title.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Number of active commission members. — A county historic preservation commission's decision was not void because the commission did not have seven members as required by an ordinance. Neither the ordinance nor the Historical Preservation Act, O.C.G.A. § 44-10-20 et seq., provided that failure to have seven active members invalidated a decision; such an express requirement was necessary under O.C.G.A. § 1-3-1(c). DeKalb County v. Buckler, 288 Ga. App. 346, 654 S.E.2d 193 (2007), cert. denied, 2008 Ga. LEXIS 374 (Ga. 2008).

Substantial compliance as standard of review. — Because the Georgia Historic Preservation Act (HPA), O.C.G.A. § 44-1-20 et seq., does not expressly provide that a county's failure to strictly comply with the HPA's uniform procedures invalidates an ordinance adopted thereunder, and because the developers failed to show the developers were harmed by the county's alleged failure to strictly comply with the procedures of the HPA, the trial court properly applied the "substantial compliance" standard of review. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. 2010).

44-10-24. Historic preservation commission — Establishment or designation; number, eligibility, and terms of members.

Law reviews. — For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

44-10-26. Designation by ordinance of historic properties or districts; required provisions; investigation and report; submittal to Department of Natural Resources; notice and hearing; notification of owners.

JUDICIAL DECISIONS

No due process violation in claimed notice deficiencies. — As the developers knew when the developers bought the developers' property that the property was in a historic district and subject to the district's restrictions on development, the developers failed to show that the developers were denied due process or otherwise harmed by any of the claimed notice deficiencies in the county's designation of the historic district. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. 2010).

Substantial compliance with notice provisions sufficient. — As the developers failed to show the developers were harmed by a county's alleged lack of strict compliance with the notice procedures of the Georgia Historic Preservation Act (HPA), O.C.G.A. § 44-10-20 et seq., and as the record established that the county substantially complied with the HPA in designating a historic district, the county's ordinance was valid. Buckler v. DeKalb County Bd. of Comm'rs, 299 Ga. App. 465, 683 S.E.2d 22 (2009), cert. denied, No. S09C2027, 2010 Ga. LEXIS 3 (Ga. 2010).

CHAPTER 11

EJECTMENT AND PROCEEDINGS AGAINST INTRUDERS

ARTICLE 1

EJECTMENT

44-11-1. Requirement that plaintiff recover on strength of own title; effect of common grantor on proof of title.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROPER PARTIES

General Consideration

Landowners' trespass and negligence suit. — Trial court properly denied a neighbor's motion for summary judgment and the appellate court reversed the denial of the cross-motion for summary judgment filed by the adjoining landowners in a trespass and negligence suit, because the neighbor purchased property without first obtaining a survey and the adjoining landowners' home was already encroaching upon the neighbor's property by two feet at the time of the purchase; the adjoining landowners were not liable for their predecessor's conduct in building the

General Consideration (Cont'd)

house and a fence across the property line of the neighbor's predecessor in title, in the absence of evidence that their predecessor was acting as their agent, and were, therefore, entitled to summary judgment. Navajo Constr., Inc. v. Brigham, 271 Ga. App. 128, 608 S.E.2d 732 (2004).

Cited in Allgood Farm, LLC v. Johnson, 275 Ga. 297, 565 S.E.2d 471 (2002).

Proper Parties

Tenant's wrongful eviction claim dismissed following foreclosure. — Trial court properly granted summary judgment to a property company and others in a tenant's suit asserting wrongful eviction and other claims because the tenant was properly summarily dispossessed following a foreclosure on the real estate at issue. Oduok v. Wedean Props., 319 Ga. App. 785, 738 S.E.2d 626 (2013).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9 Am. Jur. Pleading and Practice Forms, Ejectment, § 1.

44-11-2. When plaintiff may recover on prior possession alone.

JUDICIAL DECISIONS

Ejectment petition properly denied. — Where a successor received title to a disputed parcel of land by means of a quitclaim deed, an original property owner was not able in an ejectment petition to seek recovery based upon prior possession, which required that the defendant subsequently acquired possession by mere entry and without any lawful right whatsoever. Brooks v. Green, 277 Ga. 722, 594 S.E.2d 629 (2004).

44-11-7. Recovery of mesne profits.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Mesne profits recoverable. — In an ejectment action, the trial court erred in adopting the special master's finding that concluded that the ejector was entitled to recover the property but had no right to recover mesne profits because a plaintiff in an ejectment action may seek recovery of mesne profits, such as rental income from the land. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323 (2012).

44-11-8. Setoff of value of improvements against mesne profits by trespasser.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 14 Am. Jur. Pleading and Practice Forms, Improvements, § 2.

44-11-9. Setoff of value of improvements against mesne profits by adverse claimant; right of plaintiff to election; payment by defendant to plaintiff and acquisition of title; sale; levy; molding of decree; title of purchaser.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
REMEDIES

General Consideration

Value of all improvements recoverable.

When one sought the aid of equity in recovering land, the court was allowed to make compensation for improvements a condition of relief; judgment ordering landowners to pay for improvements on their property was affirmed where the testimony at trial amply supported the trial court's conclusion that the improvements on the land were placed in good faith. Gay v. Strain, 261 Ga. App. 708, 583 S.E.2d 529 (2003).

Mesne profits recoverable. — In an ejectment action, the trial court erred in adopting the special master's finding that concluded that the ejector was entitled to recover the property but had no right to recover mesne profits because a plaintiff in an ejectment action may seek recovery of mesne profits, such as rental income from the land. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323 (2012).

Remedies

Election of remedies must be made available. — In an ejectment action, a trial court erred by adopting the recommendation of the special master that title be vested in the ejector and that the ejectee have a judgment against the ejector in the amount of $60,000 because the trial court deprived the ejector of the ejector's statutory right to elect to recover the property within a period of time to be fixed by the trial court's decree as set forth in O.C.G.A. § 44-11-9. Small v. Irving, 291 Ga. 316, 729 S.E.2d 323 (2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 14 Am. Jur. Pleading and Practice Forms, Improvements, § 2.

44-11-12. Annexation of title abstract to petition.

JUDICIAL DECISIONS

Cited in Allgood Farm, LLC v. Johnson, 275 Ga. 297, 565 S.E.2d 471 (2002); Newcomer v. Newcomer, 278 Ga. 776, 606 S.E.2d 238 (2004).

ARTICLE 2

PROCEEDINGS AGAINST INTRUDERS

44-11-30. Manner of ejecting intruders; affidavit; ejection by sheriff; counteraffidavit.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Proceeding emphasizes defendant's good faith, not plaintiff's title.

Purchasers of real property under warranty deed from the record title holder's brother sufficiently established their good faith to be entitled to a jury trial on the title holder's claim in ejectment; therefore, a jury verdict in the purchasers' favor was upheld. Sims v. Merritt, 270 Ga. App. 877, 608 S.E.2d 547 (2004).

44-11-32. Procedure on submission of counteraffidavit; trial.

JUDICIAL DECISIONS

When trial held.

Purchasers of real property under warranty deed from the record title holder's brother sufficiently established their good faith to be entitled to a jury trial on the title holder's claim in ejectment; therefore, a jury verdict in the purchasers' favor was upheld. Sims v. Merritt, 270 Ga. App. 877, 608 S.E.2d 547 (2004).

CHAPTER 12

RIGHTS IN PERSONALTY

Article 2

Choses in Action

Sec.
44-12-24. What rights of action may and may not be assigned.

Article 5

Disposition of Unclaimed Property

Sec.
44-12-193. When property held, issued, or owing in ordinary course of

Sec.
holder's business presumed abandoned.
44-12-214. Report and remittance of persons holding property presumed abandoned under this article.
44-12-215. Publication of "Georgia Unclaimed Property List"; contents of notice.
44-12-218. Disposition of funds received under article.
Sec.
44-12-236. Alternative method of disposition with respect to certain dividends or capital credits which are presumed abandoned; definitions; procedures.
44-12-237. Unclaimed United States Savings Bond.
44-12-238. Claim for United States savings bonds escheated to state.

ARTICLE 2

CHOSES IN ACTION

44-12-20. "Chose in action" defined.

JUDICIAL DECISIONS

Criminal statute did not authorize private right of action. — O.C.G.A. §§ 44-12-20 and 51-10-1 did not authorize a mortgage borrower to bring a claim against a loan servicer for theft by conversion based on criminal statutes; the criminal statutes did not create a private right of action, and the borrower was limited to a tort claim for conversion. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

44-12-21. Rights and remedies to enforce choses in action.

JUDICIAL DECISIONS

Assignability. — Pursuant to Georgia law, the debtor's cause of action for wrongful foreclosure was an injury to property, which made it an assignable chose in action. Colony Bank Worth v. 150 Beachview Holdings, LLC (In re Fry), No. 03-20394, 2007 Bankr. LEXIS 4743 (Bankr. S.D. Ga. Mar. 23, 2007).

44-12-22. Assignment of choses in action arising upon contracts.

JUDICIAL DECISIONS

ANALYSIS

ASSIGNABLE CHOSES IN ACTION
RIGHTS OF PARTIES

Assignable Choses in Action

Legal malpractice claims. — Appellate court properly affirmed the denial of summary judgment to a lawyer on a legal malpractice claim because in light of assignments allowable under O.C.G.A. §§ 44-12-22 and 44-12-24, the Georgia Supreme Court agrees that the assignment of legal malpractice claims is not prohibited as a matter of law. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108 (2013).

Georgia Supreme Court agrees with the Georgia Court of Appeals that legal malpractice claims are not per se

Assignable Choses in Action (Cont'd)

unassignable. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108 (2013).

Rights of Parties

Contracting parties may waive or renounce what law has established in their favor, etc.

Because third party failed to present sufficient evidence supporting its position that it had a right, as successor in interest, to sue on a creditor's account with the creditor's debtor in order to support that right, summary judgment in its favor in suit against the debtor was erroneously entered. Ponder v. CACV of Colo., LLC, 289 Ga. App. 858, 658 S.E.2d 469 (2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2A Am. Jur. Pleading and Practice Forms, Assignments, § 2.

44-12-24. What rights of action may and may not be assigned.

Except for those situations governed by Code Sections 11-2-210 and 11-9-406, a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts, for legal malpractice, or for injuries arising from fraud to the assignor may not be assigned. (Civil Code 1895, § 3079; Civil Code 1910, § 3655; Code 1933, § 85-1805; Ga. L. 2001, p. 362, § 33; Ga. L. 2013, p. 634, § 1/HB 160; Ga. L. 2013, p. 636, § 1/HB 359.)

The 2013 amendments. — The first 2013 amendment, effective May 6, 2013, inserted ", for legal malpractice," in the last sentence of this Code section. The second 2013 amendment, effective May 6, 2013, made identical changes.

Law reviews. — For annual survey on legal ethics, see 64 Mercer L. Rev. 189 (2012). For annual survey on legal ethics, see 65 Mercer L. Rev. 175 (2013).

JUDICIAL DECISIONS

Analysis

Assignable Rights of Action
2. Specific Acts of Assignment
Nonassignable Rights of Action
1. In General
2. Personal Torts
3. Injuries Arising from Fraud

Assignable Rights of Action

2. Specific Acts of Assignment

Assignment of tort proceeds. — Although a court had earlier rejected a debtor's reliance on O.C.G.A. § 44-12-24 in seeking a ruling that the assignment of a tort action was invalid because the debtor had assigned the future proceeds of the action, not the right of action, the assignee creditor's default allowed the court to accept the debtor's assertion that the assignment of the proceeds to be received in the future was not a valid, enforceable assignment under Georgia law; in addition, the

creditor had no lien or perfected security interest in the proceeds under O.C.G.A. § 44-14-320; thus, because there was no valid assignment and because the creditor did not have a valid, perfected security interest under Georgia law, then the creditor was an unsecured creditor with only a claim based on the debtor's breach of her promise to pay. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, 2006 Bankr. LEXIS 2614 (Bankr. N.D. Ga. June 12, 2006).

Legal malpractice claim. — Trial court did not err in denying an attorney summary judgment on an insurer's malpractice claim because the loss was solely a financial loss, the claim involved a right of property, and the claim was assignable; the closing protection letter from the insurer to the insured created an assignment because the claim transferred to the insurer not merely the insured's rights of recovery but also the right of action. Villanueva v. First Am. Title Ins. Co., 313 Ga. App. 164, 721 S.E.2d 150 (2011), cert. denied, No. S12C0502, 2012 Ga. LEXIS 607 (Ga. 2012).

Appellate court properly affirmed the denial of summary judgment to a lawyer on a legal malpractice claim because in light of assignments allowable under O.C.G.A. §§ 44-12-22 and 44-12-24, the Georgia Supreme Court agrees that the assignment of legal malpractice claims is not prohibited as a matter of law. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108 (2013).

Georgia Supreme Court agrees with the Georgia Court of Appeals that legal malpractice claims are not per se unassignable. Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108 (2013).

Nonassignable Rights of Action

1. In General

Tort action and action for fraud. — Under O.C.G.A. § 44-12-24, a personal tort action and an action for fraud are non-assignable. Additionally, the rights to punitive damages are not assignable. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

2. Personal Torts

Title VII claims not assignable. — Because claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., for back pay, front pay, emotional pain and suffering, loss of enjoyment of life, and punitive damages were more similar to a personal injury tort action than an action to enforce contractual or property rights, an employee's assignment of a Title VII religious discrimination claim to a third party was invalid. Under O.C.G.A. § 44-12-24, a right of action for personal torts could not be assigned, and under federal common law personal injury claims were not assignable absent a statute to the contrary. Evans v. Boyd Rest. Group, LLC, 240 Fed. Appx. 393 (11th Cir. 2007) (Unpublished).

Tort claim becomes part of bankruptcy estate.

Bankruptcy debtor's agreement to pay a health care provider from the proceeds of a personal injury action created an invalid assignment since the assignment of personal injury claims was prohibited under O.C.G.A. § 44-12-24, and the putative assignment was not limited to an interest in any recovery and extended to the action itself. Klosinski v. Southeastern Neurologic Assocs. P.C (In re Oglesby), No. 99-03011A, 2000 Bankr. LEXIS 2205 (Bankr. S.D. Ga. Sept. 27, 2000).

Executor's commission not assigned. — Contracts are to be construed so as to uphold and give effect to the agreement as lawful and not to render portions of the agreement meaningless; to construe a settlement agreement and promissory note as assigning an executor's commission would have risked making the settlement agreement void ab initio under O.C.G.A. § 44-12-24, and the ambiguity was resolved by holding that the executor did not waive the executor's right to a commission. In re Estate of Sims, 259 Ga. App. 786, 578 S.E.2d 498 (2003).

Insufficient evidence of assignment. — Debtor's motion for default judgment, in an action for a declaration that the assignment of proceeds from a lawsuit to a defendant was invalid, was denied because the debtor did not assign a right of action, so O.C.G.A. § 44-12-24 did not

Nonassignable Rights of Action (Cont'd)

2. Personal Torts (Cont'd)

apply, and there was no allegation that the defendant had a lien and if so, whether it was unperfected, so O.C.G.A. § 44-14-320 did not apply. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, 2005 Bankr. LEXIS 2673 (Bankr. N.D. Ga. Nov. 9, 2005).

Creditors' 11 U.S.C. § 523(a)(4) claim against a Chapter 13 debtor, their attorney, was dismissed because although the attorney failed to file a wrongful death complaint on the creditors' behalf and represented to the creditors that the attorney had, the creditors failed to allege a contract or other agreement establishing a technical trust. The creditors' wrongful death cause of action did not comprise the res of a technical trust because under O.C.G.A. § 53-12-25 only property subject to transfer by the settler could become the subject matter of a trust, and under O.C.G.A. § 44-12-24 the creditors' wrongful death action was non-transferable. Crisler v. Farr (In re Farr), No. 11-1009, 2011 Bankr. LEXIS 1875 (Bankr. M.D. Ga. May 18, 2011).

3. Injuries Arising from Fraud

Right of action for injuries arising from fraud cannot be assigned.

While a judgment based on fraud could be assigned, a right of action for fraud could not; the Superior Court Consent Order assigned to the assignee did not contain a judgment based on fraud, as the lender's claim for fraud was specifically excepted from the judgment, and thus, the assignee had no standing to bring an action based on injuries arising from fraud to the lender. Cadlerock Joint Venture, L.P. v. Pittard (In re Pittard), 358 B.R. 457 (Bankr. N.D. Ga. 2006).

Plaintiff assignee's objection to dischargeability under 11 U.S.C. § 523(a)(2) failed because its claim was that debtor allegedly misrepresented the state of the company's accounts receivable at the time the lender made a loan; this was a right of action arising from alleged fraud, not a right to property, and as such, the lender's right of action was not assignable under O.C.G.A. § 44-12-24 (2002). Cadlerock Joint Venture, L.P. v. Pittard (In re Pittard), 358 B.R. 457 (Bankr. N.D. Ga. 2006).

ARTICLE 3

BAILMENTS

PART 1

IN GENERAL

44-12-40. "Bailment" defined.

JUDICIAL DECISIONS

ANALYSIS

CREATION OF BAILMENTS
2. ACTIVITIES ESTABLISHING BAILOR-BAILEE RELATIONSHIP

Creation of Bailments

2. Activities Establishing Bailor-Bailee Relationship

Bailment creating liability of employer for tractor carrying trash. — Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the hirer's own directions or for the hirer's gross negligence; the trial court erred in concluding that the

contractor was entitled to summary judgment on the basis that the employee was not a borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

No bailment created between insured and insurer. — Court of appeals did not err in affirming an order granting an insured summary judgment in the insured's action against an insurer to recover indemnity under the insured's commercial general liability insurance policy for property damage to a company's commercial peanut cleaner because the care, custody, and control exclusion of the policy did not apply when the peanut cleaner was not in the insured's care, custody, or control; it could not be said either that a bailment of the peanut cleaner was created or that the insured had exclusive "care, custody, or control" of the cleaner at the time that the cleaner was damaged because the insured was operating as an instrumentality of the company, moving the company's peanut cleaner to serve the company's purposes while under the company's direction and control. Owners Ins. Co. v. Smith Mech. Contrs., Inc., 285 Ga. 807, 683 S.E.2d 599 (2009).

When the debtor was granted bare legal title to a residential loan package for purposes of resale as a bailment under O.C.G.A. § 44-12-40, but had no equitable interest in the loan, the loan was not property of the debtor's estate under 11 U.S.C. § 541(d), and the creditor's interest was not avoidable under 11 U.S.C. § 544(a)(1). HSBC Mortg. Servs. v. Pettigrew (In re Southstar Funding, LLC), No. 07-65842-PWB, 2008 Bankr. LEXIS 3883 (Bankr. N.D. Ga. Oct. 4, 2008) (Unpublished).

44-12-44. Burden on bailee after loss; proper diligence standard.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 740 S.E.2d 108 (2013).

Part 2

Hiring

44-12-60. "Hiring" defined.

JUDICIAL DECISIONS

Cited in Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

44-12-62. Duties of hirer; liability for acts of bailor's agents.

JUDICIAL DECISIONS

Liability of party hiring crane for operator's negligence.

Because a contract between a crane owner and a general contractor stated that the owner's employee was a borrowed servant, a trial court correctly granted summary judgment in a negligence action arising from injuries resulting from the crane operation. Tim's Crane & Rigging, Inc. v. Gibson, 278 Ga. 796, 604 S.E.2d 763 (2004).

Trial court erred in granting summary judgment to the Georgia Ports Authority on the issue of liability in its breach of contract action against a lessee because neither the parties' contract for the lease of a gantry crane, nor the other evidence before the trial court, established that a crane operator was the lessee's borrowed servant as a matter of law under O.C.G.A. § 44-12-62(b). Cooper/T. Smith Stevedoring Co. v. State of Ga., 317 Ga. App. 362, 730 S.E.2d 168 (2012), cert. denied, No. S12C2016, S12C2023, 2013 Ga. LEXIS 34, 51 (Ga. 2013).

Liability of employer for tractor carrying trash. — Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the hirer's own directions or for the hirer's gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not a borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

44-12-63. Obligations of bailor.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Bailment for hire. — In an action in which an insurance company filed suit against a company in a subrogation action to recover money paid by the insurance company to a restaurant in Norcross, Georgia, after a fire destroyed the restaurant, the company's motion for summary judgment was denied as to the bailment claim; the bailment was for hire because: (1) the company leased the soda dispensing equipment at no cost to the restaurant because the restaurant then purchased the company's syrup for use in the equipment; and (2) the fact that the syrup was purchased through a third-party vendor did not lessen the benefit of the sale to the company, as the company was the sole supplier of the company's syrup. Colony Ins. Co. v. Coca-Cola Co., 239 F.R.D. 666 (N.D. Ga. 2007).

44-12-77. Garage owner; diligence.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 12B Am. Jur. Pleading and Practice Forms, Garages and Filling and Parking Stations, § 3.

PART 3

DEPOSITS

44-12-90. Definitions.

JUDICIAL DECISIONS

Recycler of shipping pallets did not establish status as a naked depository since it was unclear whether the recycler held the pallets gratuitously and for the benefit of the putative owner and lessor of the pallets; the recycler purchased the pallets from an entity which had no contractual relationship with the lessor, and the evidence also permitted the conclusions that the recycler claimed ownership of the pallets and that the pallets were held with an expectation of payment. CHEP USA v. Mock Pallet Co., 2005 U.S. App. LEXIS 12604 (11th Cir. June 24, 2005) (Unpublished).

44-12-96. Reimbursement of expenses incurred by reason of naked deposit; retention of possession.

JUDICIAL DECISIONS

Profit and overhead not recoverable. — Naked depository is entitled to reimbursement only for amounts paid out or labor expended by reason of the deposit, and such reimbursement does not include profit or a pro rata portion of general overhead expenses. CHEP USA v. Mock Pallet Co., 2005 U.S. App. LEXIS 12604 (11th Cir. June 24, 2005) (Unpublished).

PART 5

PAWNBROKERS

44-12-130. Definitions.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Construction with §§ 44-12-131 and 44-12-137. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satis-

fied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888 (2008).

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power, and was not in conflict with O.C.G.A. § 44-12-130 et seq. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639 (2005).

Cited in Bell v. Instant Car Title Loans (In re Bell), 279 B.R. 890 (Bankr. N.D. Ga. 2002); In re Chastagner, 498 B.R. 376 (Bankr. S.D. Ga. 2013).

RESEARCH REFERENCES

ALR. — Validity of statutes, ordinances, and regulations governing pawn shops, 16 ALR6th 219.

44-12-131. Duration of pawn transactions; lease-back of motor vehicles prohibited; taking possession of motor vehicles; restrictions on interest, fees, or charges; action to recover excessive or undisclosed charges; consequences of excessive charges.

JUDICIAL DECISIONS

Construction with §§ 44-12-130 and 44-12-137. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satisfied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888 (2008).

Motor vehicle as subject of pawn transaction. — Bankruptcy court found that the creditor was not entitled to summary judgment regarding the debtor's repossessed vehicle action where the pawnshop agreement in issue violated the statutory requirements for automobile title pawns under Georgia law, O.C.G.A. § 44-14-130. Johnson v. Speedee Cash of Columbus, Inc. (In re Johnson), 289 B.R. 251 (Bankr. M.D. Ga. 2002).

LLC that seized a Chapter 13 debtor's car 16 hours before the debtor declared bankruptcy, and sold the car without keeping records, was ordered to pay the debtor $6,579.57 for loss of the car, $300 for lost personal property that was in the car, $2,356.70 in emotional distress damages, and reasonable attorney's fees, pursuant to 11 U.S.C. § 362(k), because the evidence showed that the LLC knew the debtor declared bankruptcy before the LLC sold the car. Although the LLC claimed that the LLC was not liable under § 362 because the debtor forfeited rights in the car pursuant to the Georgia Pawnshop Act (GPA), O.C.G.A. § 44-14-403, when the debtor failed to repay a debt, the court rejected that argument because the LLC assessed interest rates over the course of the contract that exceeded the rates allowed by the GPA, such that a Motor Vehicle Pawn Contract the debtor signed was void from the contract's inception pursuant to O.C.G.A. § 44-12-131. Spinner v. Cash In A Hurry, LLC (In re Spinner), 398 B.R. 84 (Bankr. N.D. Ga. 2008).

Class action against pawn shop failed. — Pawnshop customer's action, alleging that a pawnshop failed to disclose all of the interest and charges that it

assessed against the customer and against purported class members who were similarly situated, as required by O.C.G.A. § 44-12-138(b)(6) and (8), failed upon a finding that the pawnshop had made a good faith offer to avoid litigation by tendering to the customer a check in the amount collected beyond the principal, as required by O.C.G.A. § 44-12-131(a)(7)(A); accordingly, the court found that the customer had not sufficiently complied with the ante litem notice provisions with respect to the other members of the class, who were not sufficiently identified in order to allow a good faith offer to be made to them. Mack v. Ga. Auto Pawn, Inc., 262 Ga. App. 277, 585 S.E.2d 661 (2003).

Cited in Bell v. Instant Car Title Loans (In re Bell), 279 B.R. 890 (Bankr. N.D. Ga. 2002); In re Chastagner, 498 B.R. 376 (Bankr. S.D. Ga. 2013).

44-12-132. Permanent records — Required; content.

JUDICIAL DECISIONS

County ordinance not in conflict. — Since, inter alia, parts of Gwinnett County, Ga., Ord. No. 82-11 merely strengthened the requirements of O.C.G.A. § 44-12-132 as to the records that pawnbrokers were required to keep, the ordinance was not in conflict with O.C.G.A. § 44-12-130 et seq. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639 (2005).

Cited in Rogers v. State, 285 Ga. App. 568, 646 S.E.2d 751 (2007).

44-12-135. Effect of part on local laws.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639 (2005).

44-12-137. Prohibited acts; penalties; presumption as to pledgor; replacement of lost or damaged goods.

JUDICIAL DECISIONS

Construction with §§ 44-12-130 and 44-12-131. — In resolving a statutory conflict between O.C.G.A. §§ 44-12-130(1) and 44-12-137(a)(7) with respect to the one-month duration for a pawn transaction and O.C.G.A. § 44-12-131(a)(1) which required a duration of 30 days, it was determined that the criminal penalty in § 44-12-137(a)(7) was inapplicable to a customer's pawn transaction that satisfied the 30-day requirement of § 44-12-131(a)(1); the customer's action against the pawnbroker based on an illegal duration accordingly failed. Marshall v. Speedee Cash, 292 Ga. App. 790, 665 S.E.2d 888 (2008).

44-12-138. Restrictions on advertising; disclosure tickets or statements.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Class action against pawn shop failed. — Pawnshop customer's action, alleging that a pawnshop failed to disclose all of the interest and charges that it assessed against the customer and against purported class members who were similarly situated, as required by O.C.G.A. § 44-12-138(b)(6) and (8), failed upon a finding that the pawnshop had made a good faith offer to avoid litigation by tendering to the customer a check in the amount collected beyond the principal, as required by O.C.G.A. § 44-12-131(a)(7)(A); accordingly, the court found that the customer had not sufficiently complied with the ante litem notice provisions with respect to the other members of the class, who were not sufficiently identified in order to allow a good faith offer to be made to them. Mack v. Ga. Auto Pawn, Inc., 262 Ga. App. 277, 585 S.E.2d 661 (2003).

County ordinance not in conflict. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. Pawnmart, Inc. v. Gwinnett County, 279 Ga. 19, 608 S.E.2d 639 (2005).

ARTICLE 4

TROVER

Part 1

In General

44-12-151. Right of plaintiff to elect form of verdict.

JUDICIAL DECISIONS

Analysis

Verdict for Property Alone and Its Hire

Verdict for Property Alone and Its Hire

Plaintiff is entitled to receive hire during entire period between conversion and verdict, etc.

In a trover action where the bank wrongfully repossessed the injured party's trailer, there was evidence to support the trial court's award of hire damages under O.C.G.A. § 44-12-151(3), where the injured party's husband testified that, after the trailer was seized, they were required to lease a trailer and that a fair rental value of the trailer was $100 per week; the trailer was seized on August 17, 1999, and trial began on March 20, 2001. Gateway Bank & Trust v. Timms, 259 Ga. App. 299, 577 S.E.2d 15 (2003).

44-12-152. Determination of value of property.

JUDICIAL DECISIONS

Value of personalty including stock shares were recoverable. — Trial court was authorized to award a wife cash and stock as proceeds after a cooperative converted to a publicly held company, as: (1) the wife was entitled to receive the value of the equity account for the years 1987 to 1993 as consideration for the relinquishment of the interest the wife held in the real estate; (2) such was consistent with the intent and spirit of the final decree; and (3) to rule otherwise would have left the wife with an illusory or meaningless asset. Cason v. Cason, 281 Ga. 296, 637 S.E.2d 716 (2006).

Cited in In re Estate of Tapley, 312 Ga. App. 234, 718 S.E.2d 92 (2011).

ARTICLE 5

DISPOSITION OF UNCLAIMED PROPERTY

44-12-190. Short title.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Abandoned, Lost, and Unclaimed Property, §§ 2, 18.

ALR. — Validity, construction, and application of state statutes implementing the uniform unclaimed property act or its predecessor — modern status, 29 ALR6th 507.

44-12-192. Definitions.

JUDICIAL DECISIONS

Gift certificates. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697 (2006), aff'd, remanded, 281 Ga. 744, 642 S.E.2d 687 (2007).

44-12-193. When property held, issued, or owing in ordinary course of holder's business presumed abandoned.

Except as provided in Article 17B of Title 10, all tangible and intangible property, including any income or increment thereon, less any lawful charges, that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned, except as otherwise provided by this article. Property is payable or distributable for the purpose of this article

notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment. (Code 1981, § 44-12-193, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 1992, p. 1237, § 1; Ga. L. 2006, p. 720, § 3/SB 195.)

The 2006 amendment, effective July 1, 2006, substituted "Except as provided in Article 17B of Title 10, all" for "All" at the beginning of the Code section.

JUDICIAL DECISIONS

Gift certificates not presumed abandoned. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697 (2006), aff'd, remanded, 281 Ga. 744, 642 S.E.2d 687 (2007).

44-12-194. Conditions under which intangible property subject to custody of state as unclaimed property.

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697 (2006), aff'd, remanded, 281 Ga. 744, 642 S.E.2d 687 (2007).

44-12-205. When gift certificate or credit memo presumed abandoned.

Law reviews. — For comment, "Unwrapping Escheat: Unclaimed Property Laws and Gift Cards," see 60 Emory L. J. 971 (2011).

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697 (2006), aff'd, remanded, 281 Ga. 744, 642 S.E.2d 687 (2007).

Law governing claims by owners against property holders. — O.C.G.A. § 44-12-205(b), which simply provided that an amount equal to the price paid for an unclaimed card or certificate was to be paid to the state after five years, regardless of whether the card or certificate

previously expired or otherwise lost value pursuant to contractual terms, did not provide a basis for the owners of certain gift cards and certificates to bring an action against the holder of the cards and certificates that claimed that the dormancy fees and expiration dates on the cards and certificates violated the Disposition of Unclaimed Property Act; the relationship between the owners and the holder was governed by Georgia contract law. Benson v. Simon Prop. Group, Inc., 281 Ga. 744, 642 S.E.2d 687 (2007).

44-12-214. Report and remittance of persons holding property presumed abandoned under this article.

(a) Except as provided in Article 17B of Title 10, every person holding funds or other property, tangible or intangible, presumed abandoned under this article shall report and remit to the commissioner with respect to the property as provided in this Code section.

(b) The report shall be verified and shall include:

(1) The name and social security or federal identification number, if known, and last known address, including ZIP Code, if any, of each person appearing from the records of the holder to be the owner of any property of the value of $50.00 or more presumed abandoned under this article;

(2) In case of unclaimed funds of insurance corporations, the full name of the insured or annuitant and any beneficiary, if known, and the last known address according to the insurance corporation's records;

(3) In the case of the contents of a safe-deposit box or other safekeeping repository or in the case of other tangible property, a description of the property and the place where it is held and may be inspected by the commissioner, and any amounts owing to the holder;

(4) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $50.00 each may be reported in aggregate;

(5) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(6) Other information which the commissioner prescribes by rule as necessary for the administration of this article.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report and remittance shall be filed before November 1 of each year as of June 30 next preceding, but the report and remittance

of insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. When property is evidenced by certificate of ownership as set forth in Code Section 44-12-201, the holder shall deliver to the commissioner a duplicate of any such certificate registered in the name of the commissioner at the time of report and remittance. The commissioner may postpone the reporting and remittance date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this article knows the whereabouts of the owner, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. All holders shall exercise due diligence, as defined in Code Section 44-12-192, at least 60 days but no more than 120 days prior to the submission of the report to ascertain the whereabouts of the owner if the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate and the property has a value of $50.00 or more.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The initial report and remittance filed under this Code section shall include all items of property that would have been presumed abandoned if this article had been in effect during the 15 year period preceding January 1, 1973.

(h) Nothing in this Code section shall be construed to require a utility to include in its initial report any item of money or property as to which the name of the owner and his last known address do not appear in the records maintained by the utility in accordance with rules or practices sanctioned by any state or federal regulatory body having jurisdiction over the utility. (Code 1981, § 44-12-214, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2006, p. 720, § 4/SB 195.)

The 2006 amendment, effective July 1, 2006, substituted "Except as provided in Article 17B of Title 10, every" for "Every" at the beginning of subsection (a).

44-12-215. Publication of "Georgia Unclaimed Property List"; contents of notice.

(a) The commissioner shall electronically publish notice of the reports filed under Code Section 44-12-214 on the Department of Revenue's website.

(b) The published notice shall be entitled the "Georgia Unclaimed Property List" and shall contain the names in alphabetical order and the internal identification number of persons listed in the report and

entitled to notice within the county as provided in Code Section 44-12-214.

(c) The notice shall contain a statement that information concerning the amount or description of the property and the name of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the commissioner.

(d) The commissioner shall not be required to publish in such notice any item with a value of less than $50.00 unless the commissioner deems such publication to be in the public interest. (Code 1981, § 44-12-215, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2015, p. 30, § 2/SB 82.)

The 2015 amendment, effective March 31, 2015, in subsection (a), substituted "electronically publish" for "cause to be published" near the beginning and substituted "on the Department of Revenue's website" for ", once a year in a newspaper of general circulation" at the end; and, in subsection (d), substituted "shall not be required" for "is not required" near the beginning and substituted "the commissioner" for "he" near the middle.

44-12-218. Disposition of funds received under article.

All funds received under this article, including the proceeds from the sale of abandoned property under Code Section 44-12-217, shall be deposited by the commissioner in the general fund; provided, however, that the commissioner may deduct moneys necessary to cover the direct administrative expenses required to identify, locate, secure, and transmit abandoned property prior to depositing such funds. Before making a deposit he or she shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and of the name and last known address of each insured person or annuitant and, with respect to each policy or contract listed in the report of an insurance corporation, its number, the name of the corporation, and the amount due. (Code 1981, § 44-12-218, enacted by Ga. L. 1990, p. 1506, § 1; Ga. L. 2013, p. 636, § 2/HB 359; Ga. L. 2015, p. 30, § 3/SB 82.)

The 2013 amendment, effective May 6, 2013, deleted the subsection (a) designation; in the first sentence of this Code section, deleted ", except that the commissioner shall retain in a separate trust fund a sum sufficient from which he shall make prompt payment of claims duly allowed by him as provided in Code Section 44-12-220" following "fund" at the end, and inserted "or she" near the beginning of the second sentence; and deleted former subsection (b), which read: "Before making any deposit to the credit of the general fund the commissioner may deduct:"

"(1) Any costs in connection with sale of abandoned property;

"(2) Any costs of mailing and publication in connection with any abandoned property;

"(3) Operating expenses;

"(4) Amounts required to make payments to other states, during the next fiscal year, through reciprocity agreements; and

"(5) Expenses for consulting services."

The 2015 amendment, effective March 31, 2015, in the first sentence, deleted "forthwith" following "shall" and added the proviso at the end.

44-12-226. Expiration of limitation specified by contract, statute, or court order not to affect duties required by this article.

JUDICIAL DECISIONS

No presumption of abandonment. — Assessment of dormancy fees on gift cards and certificates and refusal to honor them after one year did not violate O.C.G.A. § 44-12-205 of the Georgia Disposition of Unclaimed Property Act (DUPA), O.C.G.A. § 44-12-190 et seq; as the cards and certificates had not been unclaimed by the plaintiffs for more than five years when the complaint was filed, they were not presumed abandoned, and DUPA did not apply. Simon Prop. Group, Inc. v. Benson, 278 Ga. App. 277, 628 S.E.2d 697 (2006), aff'd, remanded, 281 Ga. 744, 642 S.E.2d 687 (2007).

Law governing claims by owners against property holders. — O.C.G.A. § 44-12-226, which simply ensured that a holder was not relieved of its obligation to deliver abandoned property to the state revenue commissioner, even though an owner's claim for possession against a holder was barred by the statute of limitations, did not provide a basis for the owners of certain gift cards and certificates to bring an action against the holder of the cards and certificates that claimed that the dormancy fees and expiration dates on the cards and certificates violated the Disposition of Unclaimed Property Act, O.C.G.A. Art. 5, Ch. 12, T. 44; the relationship between the owners and the holder was governed by Georgia contract law. Benson v. Simon Prop. Group, Inc., 281 Ga. 744, 642 S.E.2d 687 (2007).

RESEARCH REFERENCES

ALR. — Regulation of pre-paid stored-value "gift cards", 46 ALR6th 437.

44-12-236. Alternative method of disposition with respect to certain dividends or capital credits which are presumed abandoned; definitions; procedures.

(a) As used in the Code section, the term:

(1) "Approved uses" means:

(A) Donated to an Internal Revenue Code Section 501(c)(3) organization serving in the electric membership corporation's service area;

(B) Used in support of education in the electric membership corporation's service area; or

(C) Used for economic development purposes in the electric membership corporation's service area.

(2) "Electric membership corporation's service area" means any county in which the electric membership corporation provides electric service and any county adjacent thereto.

(b) All patronage dividends or capital credits presumed abandoned pursuant to this article in a given calendar year that are held by an electric membership corporation organized and operating pursuant to Article 4 of Chapter 3 of Title 46 may, in lieu of payment of delivery to the commissioner pursuant to this article, be donated for approved uses if the electric membership corporation has:

(1) Maintained for at least six months on the electric membership corporation's website or on a public posting in the electric membership corporation's main office a list of the names and last known addresses of all owners of property held by the electric membership corporation which has been presumed abandoned, together with instructions on how to claim such property; and

(2) Published in the legal organ in the county in which the electric membership corporation's main office is located notice of the last date to claim property that has been presumed abandoned. Such notice shall be published within three to six months prior to the last date to claim the property and shall state that the names of the owners may be found at the electric membership corporation's website or the main office. (Code 1981, § 44-12-236, enacted by Ga. L. 2005, p. 792, § 1/HB 431.)

Effective date. — This Code section became effective May 4, 2005.

44-12-237. Unclaimed United States Savings Bond.

(a) Notwithstanding the provisions of subsection (a) of Code Section 44-12-216, United States savings bonds which are unclaimed property and subject to the provisions of Code Section 44-12-190, et seq., the "Disposition of Unclaimed Property Act," shall escheat to the State of Georgia three years after becoming unclaimed property and subject to the provisions of Code Section 44-12-190, et seq., and all property rights to such United States savings bonds or proceeds from such bonds shall vest solely in the State of Georgia.

(b) If, within 180 days after the passage of three years pursuant to subsection (a) of this Code section, no claim has been filed in accordance with the provisions of Code Section 44-12-190, et seq., for such United States savings bonds, the commissioner shall commence a civil action in the Superior Court of Fulton County for a determination that such United States savings bonds shall escheat to the state. The commissioner may postpone the bringing of such action until sufficient United

States savings bonds have accumulated in the commissioner's custody to justify the expense of such proceedings.

(c) If no person shall file a claim or appear at the hearing to substantiate a claim or if the court shall determine that a claimant is not entitled to the property claimed, then the court, if satisfied by evidence that the commissioner has substantially complied with the laws of this state, shall enter a judgment that the subject United States savings bonds have escheated to the state.

(d) The commissioner shall redeem such United States savings bonds, and the proceeds shall be deposited in the state general fund in accordance with the provisions of Code Section 44-12-218. (Code 1981, § 44-12-237, enacted by Ga. L. 2015, p. hb0322, § 2/HB 322.)

Effective date. — This Code section became effective July 1, 2015.

44-12-238. Claim for United States savings bonds escheated to state.

Any person making a claim for the United States savings bonds escheated to the state under Code Section 44-12-237, or for the proceeds from such bonds, may file a claim in accordance with the provisions of Code Section 44-12-190, et seq., the "Disposition of Unclaimed Property Act." Upon providing sufficient proof of the validity of such person's claim, the commissioner may pay such claim in accordance with the provisions of Code Section 44-12-190, et seq. (Code 1981, § 44-12-238, enacted by Ga. L. 2015, p. hb0322, § 2/HB 322.)

Effective date. — This Code section became effective July 1, 2015.

ARTICLE 7

PROTECTION OF AMERICAN INDIAN HUMAN REMAINS AND BURIAL OBJECTS

Part 3

Legitimate American Indian Tribes

Law reviews. — For comment, "Lawless by Design: Jurisdiction, Gender and Justice in Indian Country," see 59 Emory L.J. 1515 (2010).

44-12-300. Tribes, bands, groups, or communities recognized by state as legitimate American Indian Tribes.

Law reviews. — For comment, "Lawless by Design: Jurisdiction, Gender and Justice in Indian Country," see 59 Emory L.J. 1515 (2010).

CHAPTER 13

EXEMPTIONS FROM LEVY AND SALE

Article 1

Constitutional Exemptions

PART 1

IN GENERAL

Sec.

44-13-1. Amount of exemption; who may claim exemption; what charges enforceable.

44-13-11. Approval of application; transmittal of copy of exempted real property to other counties; recordation.

Sec.

44-13-20. Reversion of property set apart for spouse, children, or dependents.

Article 2

Statutory Exemptions

44-13-100. Exemptions for purposes of bankruptcy and intestate insolvent estates.

Article 3

Domesticated Judgment

44-13-120. Rights of Georgia residents.

ARTICLE 1

CONSTITUTIONAL EXEMPTIONS

PART 1

IN GENERAL

44-13-1. Amount of exemption; who may claim exemption; what charges enforceable.

Except as otherwise provided in this article, there shall be exempt from levy and sale by virtue of any process whatever under the laws of this state any real or personal property or both of a debtor in the amount of $5,000.00 or $21,500.00 for real or personal property that is the debtor's primary residence. No court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against property set apart under this Code section, including such improvements as may be made thereon from time to time, except for taxes, for the purchase money of the property, for labor done on the property, for material furnished for the property, or for the removal of encumbrances on the property. (Ga. L. 1868, p. 27, § 1; Code

1873, § 2002; Code 1882, § 2002; Civil Code 1895, § 2827; Civil Code 1910, § 3377; Code 1933, § 51-101; Ga. L. 1976, p. 346, § 1; Ga. L. 1983, p. 1170, § 2; Ga. L. 2012, p. 1030, § 1/SB 117.)

The 2012 amendment, effective May 2, 2012, added "or $21,500.00 for real or personal property that is the debtor's primary residence" at the end of the first sentence of this Code section.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 13A Am. Jur. Pleading and Practice Forms, Homestead, § 2.

44-13-1.1. "Dependent" defined.

JUDICIAL DECISIONS

Relationship to other provisions. — The Georgia Code does not define the term "dependent" for purposes of O.C.G.A. § 44-13-100(a)(11)(C), and although O.C.G.A. § 44-13-1.1 defines the term "dependent," that section is located in O.C.G.A. T. 44, Ch. 13, Art. 1, and defines the term "dependent" for purposes of "this article," and O.C.G.A. § 44-13-100(a)(11)(C) is not found in T. 44, Ch. 13, Art. 1; accordingly, the definition of "dependent" provided by O.C.G.A. § 44-13-1.1 is not applicable to O.C.G.A. § 44-13-100(a)(11)(C). In re Bright, No. 05-14093-WHD, 2007 Bankr. LEXIS 2971 (Bankr. N.D. Ga. July 16, 2007).

44-13-11. Approval of application; transmittal of copy of exempted real property to other counties; recordation.

If, at the time and place appointed for passing upon the application, no objection is raised by any creditor of the applicant, the judge of the probate court shall endorse upon the schedule and upon the plat: "Approved this the ____ day of _____, _____," filling the blanks, and shall sign the schedule and plat officially and hand such application to the clerk of the superior court of the clerk's county; and, when land out of the clerk's county is exempted, the judge shall transmit a certified copy of the exempted real property to the clerk of the superior court of each county in which exempted land is located. Each clerk of the superior court of a county in which exempted land is located shall record the exempted real property in a book to be kept for that purpose. (Ga. L. 1868, p. 27, § 5; Code 1873, § 2009; Ga. L. 1877, p. 18, § 1; Code 1882, § 2009; Civil Code 1895, § 2835; Ga. L. 1898, p. 51, § 1; Civil Code 1910, § 3385; Code 1933, § 51-402; Code 1981, § 44-13-12; Ga. L. 1982, p. 3, § 44; Code 1981, § 44-13-11, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 1999, p. 81, § 44; Ga. L. 2011, p. 99, § 83/HB 24.)

The 2011 amendment, effective January 1, 2013, in the first sentence, substituted "such application" for "them" and twice substituted "the clerk's county" for "his county"; and deleted "in his office, which record or a certified transcript thereof shall be competent evidence in all the courts of this state" following "purpose" at the end of the last sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

44-13-20. Reversion of property set apart for spouse, children, or dependents.

Property set apart pursuant to Code Section 44-13-2 for a spouse, for a spouse and minor children, for minor children alone, or for dependents of a debtor (1) upon the death of the spouse or the spouse's remarriage, when set apart to the spouse alone, (2) upon the attaining of the age of 18 by the minor children or their emancipation during minority, when set apart for the minor children, (3) upon the death or remarriage of the spouse and the attaining of the age of 18 by the minor children or the emancipation of the minor children, when set apart to the spouse and minor children, and (4) upon a former dependent person's no longer being eligible to be claimed by the debtor as a dependent for income tax purposes pursuant to Code Section 48-7-26, shall revert to the estate from which it was set apart unless it was sold or reinvested pursuant to this article, in which case this Code section shall apply to and follow all the reinvestments unless the fee simple has been sold as provided in this article. (Ga. L. 1868, p. 27, § 10; Ga. L. 1869, p. 25, § 1; Code 1873, § 2024; Ga. L. 1876, p. 48, § 6; Code 1882, § 2024; Civil Code 1895, § 2846; Civil Code 1910, § 3396; Code 1933, § 51-705; Code 1981, § 44-13-21; Code 1981, § 44-13-20, as redesignated by Ga. L. 1983, p. 1170, § 2; Ga. L. 2006, p. 141, § 8/HB 847.)

The 2006 amendment, effective July 1, 2006, near the middle of this Code section, substituted "18" for "majority" twice and substituted "emancipation" for "marriage" twice.

Cross references. — Emancipation of minors, Art. 6, Ch. 11, T. 15.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

ARTICLE 2

STATUTORY EXEMPTIONS

44-13-100. Exemptions for purposes of bankruptcy and intestate insolvent estates.

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(1) The debtor's aggregate interest, not to exceed $21,500.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor. In the event title to property used for the exemption provided under this paragraph is in one of two spouses who is a debtor, the amount of the exemption hereunder shall be $43,000.00;

(2) The debtor's right to receive:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit;

(B) A veteran's benefit;

(C) A disability, illness, or unemployment benefit;

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) A payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and

(F) A payment from an individual retirement account within the meaning of Title 26 U.S.C. Section 408 to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(2.1) The debtor's aggregate interest in any funds or property held on behalf of the debtor, and not yet distributed to the debtor, under any retirement or pension plan or system:

(A) Which is: (i) maintained for public officers or employees or both by the State of Georgia or a political subdivision of the State of Georgia or both; and (ii) financially supported in whole or in part

by public funds of the State of Georgia or a political subdivision of the State of Georgia or both;

(B) Which is: (i) maintained by a nonprofit corporation which is qualified as an exempt organization under Code Section 48-7-25 for its officers or employees or both; and (ii) financially supported in whole or in part by funds of the nonprofit corporation;

(C) To the extent permitted by the bankruptcy laws of the United States, similar benefits from the private sector of such debtor shall be entitled to the same treatment as those specified in subparagraphs (A) and (B) of this paragraph,

provided that the exempt or nonexempt status of periodic payments from such a retirement or pension plan or system shall be as provided under subparagraph (E) of paragraph (2) of this subsection; or

(D) An individual retirement account within the meaning of Title 26 U.S.C. Section 408;

(3) The debtor's interest, not to exceed the total of $5,000.00 in value, in all motor vehicles;

(4) The debtor's interest, not to exceed $300.00 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. The exemption of the debtor's interest in the items contained in this paragraph shall not exceed $5,000.00 in total value;

(5) The debtor's aggregate interest, not to exceed $500.00 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(6) The debtor's aggregate interest, not to exceed $1,200.00 in value plus any unused amount of the exemption, not to exceed $10,000.00, provided under paragraph (1) of this subsection, in any property;

(7) The debtor's aggregate interest, not to exceed $1,500.00 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor;

(8) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract;

(9) The debtor's aggregate interest, not to exceed $2,000.00 in value, less any amount of property of the estate transferred in the manner specified in Section 542(d) of U.S. Code Title 11, in any accrued dividend or interest under, or loan or cash value of, any

unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent;

(10) Professionally prescribed health aids for the debtor or a dependent of the debtor; and

(11) The debtor's right to receive, or property that is traceable to:

(A) An award under a crime victim's reparation law;

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) A payment, not to exceed $10,000.00, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(b) Pursuant to 11 U.S.C. Section 522(b)(1), an individual debtor whose domicile is in Georgia is prohibited from applying or utilizing 11 U.S.C. Section 522(d) in connection with exempting property from his or her estate; and such individual debtor may exempt from property of his or her estate only such property as may be exempted from the estate pursuant to 11 U.S.C. Section 522(b)(2)(A) and (B). For the purposes of this subsection, an "individual debtor whose domicile is in Georgia" means an individual whose domicile has been located in Georgia for the 180 days immediately preceding the date of the filing of the bankruptcy petition or for a longer portion of such 180 day period than in any other place.

(c) The exemptions and protections contained in this article are extended to intestate insolvent estates in all cases where there is a living widow or child of the intestate. (Ga. L. 1865-66, p. 29, § 1; Code 1868, § 2022; Code 1873, § 2049; Code 1882, § 2049; Civil Code 1895, § 2875; Civil Code 1910, § 3425; Code 1933, § 51-1504; Code 1933, § 51-1301.1, enacted by Ga. L. 1980, p. 952, § 2; Code 1933, § 51-1601, enacted by Ga. L. 1980, p. 952, § 3; Ga. L. 1981, p. 626, §§ 2, 3; Ga. L.

1988, p. 1756, § 1; Ga. L. 1989, p. 14, § 44; Ga. L. 1995, p. 347, § 1; Ga. L. 2001, p. 745, § 1; Ga. L. 2012, p. 1030, § 2/SB 117; Ga. L. 2013, p. 141, § 44/HB 79; Ga. L. 2013, p. 1045, § 2/SB 105; Ga. L. 2015, p. 996, § 6-1/SB 65.)

The 2012 amendment, effective May 2, 2012, in paragraph (a)(1), substituted "$21,500.00" for "$10,000.00" near the beginning and substituted "$43,000.00" for "$20,000.00" at the end.

The 2013 amendments. — The first 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation near the middle of subparagraph (a)(2.1)(C). The second 2013 amendment, effective July 1, 2013, substituted "$5,000.00" for "$3,500.00" in the middle of paragraph (a)(3).

The 2015 amendment, effective July 1, 2015, in paragraph (a)(6), substituted "$1,200.00" for "$600.00" near the beginning and substituted "$10,000.00" for "$5,000.00" near the middle.

Editor's notes. — Ga. L. 2015, p. SB 65, § 1-1/SB 65, not codified by the General Assembly, provides that: "(a) This Act shall be known and may be cited as the 'Debtor Creditor Uniform Law Modernization Act of 2015.'

"(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized laws affecting such rights, responsibilities, and relationships."

Law reviews. — For article, "Avoidance of Liens: Section 522(f)," see 4 Bank. Dev. J. 95 (1987). For Eleventh Circuit survey article on bankruptcy decisions in 2003, see 55 Mercer L. Rev. 1101 (2004). For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010). For article, "Consumer Bankruptcy Panel: Hot Consumer Bankruptcy Plan Issues," see 28 Emory Bankr. Dev. J. 333 (2012). For annual survey on bankruptcy law, see 64 Mercer L. Rev. 849 (2013).

JUDICIAL DECISIONS

Constitutionality. — Constitutionality of O.C.G.A. § 44-13-100(a)(9) is upheld because the statute does not violate the uniformity provision of the Bankruptcy Clause, the Supremacy Clause, or the Equal Protection Clause of the U.S. Constitution. In re Joyner, 489 B.R. 292 (Bankr. S.D. Ga. 2012).

Limiting debtors to the $2,000 exemption for the cash value of life insurance did not violate the Supremacy Clause of the United States Constitution because Georgia law and federal law were not in conflict since Congress expressly granted states the power to opt-out of the federal exemptions and provide for exemptions under state laws. Furthermore, the statute applied uniformly to all debtors in bankruptcy. McFarland v. Wallace, 516 B.R. 665 (S.D. Ga. 2014).

Limiting bankruptcy debtors to the $2,000 exemption for the cash value of life insurance, while permitting non-bankruptcy debtors to exempt the full cash surrender value of a life insurance policy under O.C.G.A. § 33-25-11, did not violate the Equal Protection Clause of the Georgia Constitution because bankruptcy debtors and non-bankruptcy debtors were not in similar circumstances and, therefore, the Georgia Constitution did not require that they receive equal treatment. McFarland v. Wallace, 516 B.R. 665 (S.D. Ga. 2014).

Application. — O.C.G.A. § 44-13-100, by the statute's express terms, applies to bankruptcy debtors. By contrast, nothing in the history or language of O.C.G.A. § 33-25-11(c) indicates the legislature intended the statute to apply in bankruptcy; therefore, O.C.G.A. § 33-25-11(c) is unavailable for purposes of exempting prop-

erty from a debtor's bankruptcy estate. In re Dean, 470 B.R. 643 (Bankr. M.D. Ga. 2012).

Debtor's exemption in the cash surrender value of a life insurance policy received from a fraternal benefit society was limited to the amount in O.C.G.A. § 44-13-100(a)(9), and O.C.G.A. § 33-15-62 did not apply. Section 44-13-100(a)(9) does not distinguish between policies provided by a fraternal benefit society and those that were not. Walton v. Gay (In re Gay), No. 11-60817, 2012 Bankr. LEXIS 3671 (Bankr. S.D. Ga. Aug. 9, 2012).

Debtors were not entitled to reconsideration of an order finding that applicable vehicle exemption value allowed for debtors was the amount under the law on the date the debtors filed the debtors' petition, not the increased amount as of the conversion date, because the applicable law was the law as of the petition date. Dey v. Peoples Cmty Nat'l Bank, N.A. (In re Dey), 2013 Bankr. LEXIS 5060 (Bankr. N.D. Ga. Nov. 1, 2013).

Judgment creditor's objection to the debtor's claim of a homestead exemption as excessive was not warranted because the $43,000 exemption limit was applicable based on the fact that the property was titled solely in the debtor's name, the debtor used the property as the debtor's residence, and the debtor's spouse was not a codebtor in the bankruptcy case. In re Mixon, 2014 Bankr. LEXIS 6 (Bankr. S.D. Ga. Jan. 2, 2014).

Purpose. — O.C.G.A. § 44-13-100 was passed with the specific purpose of determining what property shall be eligible for exemption from the bankruptcy estate. Additionally: (i) O.C.G.A. § 44-13-100(9) applies only to the cash surrender value of insurance policies and limits that exemption expressly to $2,000; (ii) O.C.G.A. § 33-25-11, on the other hand, protects all cash surrender value of an insurance policy but only from certain creditor remedies; it does not attempt to characterize cash surrender value as "exempt"; and, (iii) without clear direction from the Georgia legislature that it intended to do so, the court would not read § 33-25-11 to effectively eliminate § 44-13-100(a)(9). Roach v. Ryan (In re Ryan), No. 11-40712, 2012 Bankr. LEXIS 784 (Bankr. S.D. Ga. Jan. 17, 2012).

Bankruptcy court did not err in concluding that O.C.G.A. § 33-25-11 did not provide the bankruptcy debtor an exemption from the bankruptcy estate because O.C.G.A. § 44-13-100 prevailed over the more general provisions of O.C.G.A. § 33-25-11. McFarland v. Wallace, 516 B.R. 665 (S.D. Ga. 2014).

Some of Georgia's state exemptions are found in O.C.G.A. § 44-13-100; however, in short, not all of Georgia's exemptions are contained within the four corners of O.C.G.A. § 44-13-100. Debtor's workers' compensation claims were beyond the reach of creditors in bankruptcy. In re Fullwood, 446 B.R. 634 (Bankr. S.D. Ga. 2010).

Exemption for both spouses filing jointly even though property titled only in husband's name. — Based on both the language and the legislative history of O.C.G.A. § 44-13-100(a)(1), the debtors could claim a $20,000.00 exemption, $10,000.00 for each spouse, for equity in their residence even though the property was titled only in the husband's name; there was no logical reason that the Georgia Assembly would give less protection to a couple filing jointly than to a debtor/non-debtor couple, and it appeared that a change in the language from a proposed amendment that clearly applied to jointly-filing spouses was changed to the current version to expand, not limit, the reach of the statute. In re Hartley, No. 01-13332-WHD, 2002 Bankr. LEXIS 1884 (Bankr. N.D. Ga. July 18, 2002).

Exemption applies to debtor's "aggregate interest". — Under Georgia law, an exemption applies to the "debtor's aggregate interest" in property, O.C.G.A. § 44-13-100(a), and the property may appreciate in value after the debtor has become entitled to the exemption. Mullis v. Aggeorgia Farm Credit, ACA (In re Jones), 357 B.R. 888 (Bankr. M.D. Ga. 2005).

Similarity to federal and other states' law.

Exemptions set forth in O.C.G.A. § 44-13-100(a)(11)(A) were identical to those set forth in 11 U.S.C. § 522(d)(11)(A) and debtors were not per-

mitted to exempt from the bankruptcy estate money that was ordered paid to them for restitution of a wrongful conversion of their property; debtors had not shown that the court ordered restitution was being made to compensate them for future loss of earnings or for personal injury. In re Seymour, 285 B.R. 57 (Bankr. N.D. Ga. 2002).

Federal judicial precedent interpreting 11 U.S.C. § 522(d)(1) also determined what the Georgia General Assembly meant when it used the same words in O.C.G.A. § 44-13-100(a)(2)(E) because the state statute was modeled after the federal statute, the state statute had not changed since its original enactment, and any amendments were clearly intended to broaden the availability of exemptions. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911 (Bankr. N.D. Ga. 2005).

Privately funded annuity that the debtor claimed was exempt from the bankruptcy estate under O.C.G.A. § 44-13-100(a)(2.1), was analyzed under the requirements set forth in 11 U.S.C. § 522(d)(10) because the state statute closely patterned the federal scheme and referenced that the annuity would be exempt to the extent permitted by the bankruptcy laws of the United States. In re Michael, 339 B.R. 798 (Bankr. N.D. Ga. 2005).

Exemptions not preempted by federal exemptions. — Georgia's exemptions were not preempted by the federal exemptions, on the basis that the Georgia exemptions were below the federal exemptions, because nothing in 11 U.S.C. § 522(b) (or elsewhere in the Bankruptcy Code) limited a state's power to restrict the scope of the state's exemption; the state could theoretically accord no exemptions at all. Coleman v. Harris (In re Harris), No. 99-10241, 1999 Bankr. LEXIS 2111 (Bankr. S.D. Ga. Oct. 21, 1999).

Georgia opted out of federal exemption scheme. — Debtor could only assert a claim of $10,000 for a real property homestead exemption, pursuant to O.C.G.A. § 44-13-100 and could not claim more under the federal statutes because Georgia had opted out of the federal exemption scheme. In re Vaughn, No. 08-64071-MGD, 2008 Bankr. LEXIS 3880 (Bankr. N.D. Ga. Nov. 25, 2008).

Argument that Georgia had not effectively opted out of the federal exemptions following the 1994 amendments to the Bankruptcy Code was rejected because states did not have to re-enact opt-out legislation following the 1994 amendments to the Bankruptcy Code. Coleman v. Harris (In re Harris), No. 99-10241, 1999 Bankr. LEXIS 2111 (Bankr. S.D. Ga. Oct. 21, 1999).

Life insurance beneficiary rights. — 11 U.S.C. § 522(d)(7) exempts only the life insurance contract itself and not any beneficiary rights; O.C.G.A. § 44-13-100(a)(8) exempts the same. Life insurance proceeds a debtor receives within 180 days after filing bankruptcy are property of the estate; § 44-13-100(a)(8) does not exempt these proceeds because that section does not apply to beneficiary rights. In re Gonzalez, No. JTL, 2012 Bankr. LEXIS 5369 (Bankr. M.D. Ga. Nov. 8, 2012).

In a Chapter 13 case when the debtor sought to retain life insurance proceeds that the debtor received due to the debtor's spouse/joint debtor's death, while the proceeds were the property of the estate, a calculation that assumed declining commission income for the 68-year-old debtor resulted in most of the insurance proceeds determined to be reasonably necessary for the debtor's support and therefore exempt. In re Taylor, 523 B.R. 915 (Bankr. S.D. Ga. 2014).

Effect of lien on exempted property. Proper method for calculating the avoidability of a judicial lien where debtor and the debtor's spouse jointly owed a first mortgage on their jointly owned home which was also subject to a second priority judicial lien owed solely by the debtor was to first deduct the mortgage from the total value of the home to establish the net equity which was divided equally between debtor and the debtor's spouse, and then apply the mathematical formula provided in 11 U.S.C. § 522(f)(2)(A) to debtor's one-half equity interest. To the extent the judicial lien would not permit the debtor to take an exemption in the property, the judicial lien impairs the debtor's exemption and is avoidable; however, a creditor

retains its judicial lien on any unencumbered, nonexempt portion of debtor's equity in the property. Schupp v. Bearson (In re Schupp), 304 B.R. 906 (Bankr. N.D. Ga. 2004).

Construction with Insurance Code. — There is no indication that the Georgia General Assembly intended to amend or supplement the bankruptcy specific exemptions found in O.C.G.A. § 44-13-100 by way of the more general Georgia Insurance Code provisions. Rather, it appears that the General Assembly intended the Georgia Insurance Code to apply to nonbankruptcy situations with the bankruptcy specific exemptions in § 44-13-100 applying in bankruptcy cases. In re Allen, No. JPS, 2010 Bankr. LEXIS 3563 (Bankr. M.D. Ga. Oct. 4, 2010).

Lien avoided.

Judgment lienor's objection that Chapter 7 debtor undervalued the debtor's home in order to avoid the lien was overruled because the drive-by appraisal of the home performed by the lienor's appraiser was not credible compared with the complete appraisal performed by debtor's appraiser, which cited defects in the home, including a settlement problem. Schupp v. Bearson (In re Schupp), 304 B.R. 906 (Bankr. N.D. Ga. 2004).

Because a debtor's total equity of $14,000 was less than the maximum allowed exemption in real property of $20,000.00 and her spouse did not file for bankruptcy, the debtor was entitled to avoid a judicial lien held by a creditor in its entirety with respect to the real property, a residence, pursuant to O.C.G.A. § 44-13-100(a)(1). Barnes v. Cavalry Invs. LLC (In re Barnes), No. G04-23195-REB, 2005 Bankr. LEXIS 1213 (Bankr. N.D. Ga. May 13, 2005).

Because a creditor's qualifying judicial lien would impair an exemption of the debtors if they amended their schedules to claim the exemption under O.C.G.A. § 44-13-100(1)(a), (6), the judicial lien was avoidable in its entirety under 11 U.S.C. § 522(f), as the amounts two non-avoidable mortgage liens plus the amount of the judicial lien exceeded the value of the real property. In re Smith, No. 05-60736 JTL, 2006 Bankr. LEXIS 877 (Bankr. M.D. Ga. May 16, 2006).

When the bankruptcy court concluded that an Internal Revenue Service tax lien, which was junior to the creditor's judicial lien on the debtor's home, should be included in the calculation under 11 U.S.C. § 522(f)(2)(A), and the sum of liens and the state exemption under O.C.G.A. § 44-13-100 greatly exceeded the debtor's interest in the property, the bankruptcy court correctly concluded that the creditor's judicial lien could be avoided in its entirety. Cadle Co. v. Taras (In re Taras), 2005 U.S. App. LEXIS 7666 (11th Cir. Apr. 29, 2005) (Unpublished).

Aggregation of exemptions.

Because a Chapter 7 debtor could have claimed an additional exemption of $ 500 under Georgia's "wildcard" exemption, O.C.G.A. § 44-13-100(a)(6), instead of just the § 44-13-100(a)(4) exemption, which was limited to $ 300, the debtor was given time to amend the Schedule C to exempt the debtor's laptop up to its full value. First Franklin Fin. v. Yawn (In re Yawn), No. 09-21472, 2010 Bankr. LEXIS 486 (Bankr. S.D. Ga. Feb. 5, 2010).

O.C.G.A. § 44-13-100 prevails over O.C.G.A. § 33-25-11. — O.C.G.A. § 44-13-100 is the statute specific to bankruptcy exemptions and therefore it prevails over the more general provisions of O.C.G.A. § 33-25-11; the Georgia legislature drafted the exemption statute, § 44-13-100, specifically with bankruptcy in mind. In doing so, it struck the intended balance between allowing a debtor in bankruptcy to exempt a limited amount of property in exchange for receiving a bankruptcy discharge; in striking this balance, the legislature limited the aggregate exemption in such policies to $2,000. In re Sapp, No. 11-30468, 2012 Bankr. LEXIS 2773 (Bankr. S.D. Ga. June 15, 2012).

Entitlement to spousal homestead exemption. — If a residence is titled only in the name of a married debtor, the debtor is entitled to a $20,000.00 homestead exemption to protect the equitable interest of the non-debtor spouse; however, if a residence is jointly titled in the names of the debtor and the non-debtor spouse, the debtor is limited to a $10,000.00 exemption. Wright v. Taylor (In re Taylor), No. 04-691 85-CRM, 2005 Bankr. LEXIS 269 (Bankr. N.D. Ga. Jan. 27, 2005).

Chapter 7 debtor was entitled to a $10,000.00 exemption, not a $20,000.00 exemption, under O.C.G.A. § 44-13-100(a)(1) because, although the debtor's residence was titled in the names of both the debtor and the spouse, the spouse was not a debtor in the bankruptcy case. Wright v. Taylor (In re Taylor), No. 04-691 85-CRM, 2005 Bankr. LEXIS 269 (Bankr. N.D. Ga. Jan. 27, 2005).

Enhanced exemption for married debtors pursuant to O.C.G.A. § 44-13-100(a)(1) applied only where the residence was titled in only one spouse and that spouse was a bankruptcy debtor; accordingly, because the property in the instant case was jointly owned, the debtor's homestead exemption was limited to $10,000.00. In re Hiers, No. 03-51446-JDW, 2005 Bankr. LEXIS 3143 (Bankr. S.D. Ga. Sept. 26, 2005).

Applicability to separated spouse. — Chapter 7 trustee's objection to a debtor's claim for a $20,000.00 exemption in the debtor's residence under the Georgia homestead exemption statute, O.C.G.A. § 44-13-100(a)(1), was overruled because: (1) O.C.G.A. § 1-3-1 did not invite a court to usurp the power of the General Assembly by legislating from the bench each time the exemption statute created an unusual result; (2) the duration of the debtor's separation from the debtor's spouse, while indicative of a desire to discontinue the traditional role of spouse, was not determinative of a circumstance that would authorize the court to consider such a person as an entity other than a "spouse" as used in the homestead exemption statute; and (3) there was no basis for inferring legislative intent to allow married couples, whether they lived together or separately, to spread a $20,000.00 exemption across multiple residences. In re Green, 319 B.R. 913 (Bankr. M.D. Ga. 2004).

Social Security benefits. — Bankruptcy court did not have jurisdiction under 28 U.S.C. § 1334(b) to hear an adversary proceeding a Chapter 7 debtor filed against the Social Security Administration (SSA) seeking an order requiring the SSA to waive recovery of overpayments of Social Security disability benefits the debtor received. The debtor's claims did not arise under the Bankruptcy Code and there was no nexus between the debtor's claims and the administration of the debtor's bankruptcy estate because the disability benefits were exempt property under 11 U.S.C. § 522(d)(10) and O.C.G.A. § 44-13-100. Rodriquez v. United States (In re Rodriquez), No. 09-93431-JB, 2010 Bankr. LEXIS 955 (Bankr. N.D. Ga. Mar. 23, 2010).

Insurance proceeds from loss of exempt property. — Debtor could not use the Georgia motor vehicle exemption under O.C.G.A. § 44-13-100(a)(3) to exempt proceeds from a property damage settlement that resulted from a car accident in which her vehicle was destroyed; the proceeds that the debtor sought to exempt were compensation for the loss of a car and were not protected by the exemption statute either as a motor vehicle or as proceeds of a motor vehicle. In re Carelock, No. 05-51431-JDW, 2006 Bankr. LEXIS 3415 (Bankr. S.D. Ga. Jan. 13, 2006).

Farmer-debtor.

Bankruptcy court sustained a trustee's objection to a Chapter 7 debtor's claim that an interest in a tractor was exempt from creditors' claims up to $3,500 under O.C.G.A. § 44-13-100(a)(3) because the tractor was a motor vehicle. The tractor was not a "motor vehicle" under § 44-13-100(a)(3) because the tractor was not designed to be used, nor ordinarily used, to transport people or property on roads. In re Matthews, 449 B.R. 833 (Bankr. M.D. Ga. 2011).

Tractor as tool of trade of farmer. — Bankruptcy court allowed a Chapter 7 debtor's claim that a tractor the debtor owned was exempt from creditors' claims up to $1,500 under O.C.G.A. § 44-13-100(a)(7) because the debtor used the tractor to farm real property he owned with his wife, and it was a "tool of his trade." However, the court sustained a trustee's objection to the wife's claim that she was also entitled to claim an exemption under § 44-13-100(a)(7) because she did not drive the tractor and had not used the tractor to conduct farming operations. In re Matthews, 449 B.R. 833 (Bankr. M.D. Ga. 2011).

Life insurance exemptions under § 44-13-100(a)(11)(C). — Bankruptcy

court found that a wife who filed a joint petition with her husband under Chapter 7 of the Bankruptcy Code three months before her husband died was dependent on her husband's ability to run a company they owned together, and it allowed the wife to exempt $84,588 out of almost $105,000 in life insurance proceeds she received, pursuant to O.C.G.A. § 44-13-100(a)(11)(C); although the court refused to assume that the state legislature intended to permit spouses to exempt life insurance proceeds simply because language which appeared in § 44-13-100(a)(11)(C) was similar to language which appeared in 11 U.S.C. § 522(d)(11)(C), it found that the wife was a "dependent" for purposes of § 44-13-100(a)(11)(C). In re Bright, No. 05-14093-WHD, 2007 Bankr. LEXIS 2971 (Bankr. N.D. Ga. July 16, 2007).

Chapter 7 trustee's objection was sustained and a debtor was denied an exemption under O.C.G.A. § 44-13-100(a)(11)(C) in the liquidated life insurance proceeds from the debtor's late spouse because the debtor voluntarily transferred the funds to the executor of the late spouse's estate under 11 U.S.C. § 522(g) in the belief that the law required such turnover, and the debtor failed to show that the debtor was subject to any great pressure to transfer the funds or that the debtor would not have turned the funds over if the debtor had known that the funds were not property of the spouse's estate. In re Sumner, No. 05-14243-WHD, 2007 Bankr. LEXIS 4406 (Bankr. N.D. Ga. Nov. 26, 2007).

Exemption of personal injury payments.

Even though a debtor's interest in a personal injury claim was considered exempt property pursuant to O.C.G.A. § 44-13-100(a)(11)(D), it had to be included in her Chapter 13 plan as "disposable income" for use by the trustees to pay creditors, pursuant to 11 U.S.C. § 1325, because the debtor's regular income was sufficient to cover her monthly expenses. In re Springer, 338 B.R. 515 (Bankr. N.D. Ga. 2005).

Court had authority under 11 U.S.C. § 329 over an attorney's fees because the personal injury case in which the attorney represented the Chapter 13 debtor was connected to the bankruptcy case; the debtor filed for bankruptcy due to lost wages following the accident, and any claim in excess of the debtor's exemption under O.C.G.A. § 44-13-100(a)(11)(D) would be property of the estate. In re Thornton, No. 04-51703-JDW, 2005 Bankr. LEXIS 3145 (Bankr. S.D. Ga. Aug. 8, 2005).

Under O.C.G.A. § 44-13-100(a)(11)(E), a debtor could exempt compensation for lost future wages, notwithstanding the fact that the claim for lost future wages arose from a personal bodily injury. This was analogous to permitting an exemption of a portion of a personal injury settlement or award under 11 U.S.C. § 522(d)(11)(D) and a portion under 11 U.S.C. § 522(d)(11)(E). In re Lowery, No. 05-13536-WHD, 2007 Bankr. LEXIS 3729 (Bankr. N.D. Ga. Sept. 24, 2007).

It was undisputed that debtor had suffered serious injuries due to a 1996 collision, including injuries to the neck, back, and shoulder, and the debtor testified that the debtor still required physical therapy, experienced back pain, and suffered from memory loss. In light of these circumstances, a portion of the $25,000 payment was intended to compensate debtor for the actual bodily injuries that were suffered in the collision. Wasden v. Nationwide Mutual Ins. Co. (In re Weaver), No. 04-4118, 2006 Bankr. LEXIS 4654 (Bankr. S.D. Ga. July 19, 2006).

Due to injuries suffered in a 1996 collision, it was undisputed that the debtor could neither continue in the debtor's job as a clerical assistant nor continue studies to become an x-ray technician, and the debtor testified that the debtor had not had full-time employment since the collision and that the debtor's primary income had been in the form of payments from Social Security and pension. In light of debtor's circumstances, a portion of the $25,000 payment was reasonably necessary to support the debtor and was intended to compensate the debtor for loss of future earnings due to the collision. Wasden v. Nationwide Mutual Ins. Co. (In re Weaver), No. 04-4118, 2006 Bankr. LEXIS 4654 (Bankr. S.D. Ga. July 19, 2006).

Exempt status of workers' compensation awards. — O.C.G.A. § 44-13-100

did not need to address the exempt status of Workers' Compensation awards again because there was a broad exemption already in place; the statute did carve out the cash surrender values of life insurance policies, which were not already exempt, but placed a cap on the policies. Debtor's life insurance cash surrender value exemption here was limited to the $2,000 set by § 44-13-100(a)(9). Roach v. Ryan (In re Ryan), No. 11-40712, 2012 Bankr. LEXIS 784 (Bankr. S.D. Ga. Jan. 17, 2012).

Age as factor in annuity. — Supreme Court of Georgia holds that a debtor's right to receive payments from an annuity is on account of age if there exists a causal connection between the right to payment and the debtor's age; the requisite connection may be established in a myriad of ways, proof of which is limited only by the circumstances under which the annuity is created and the terms and conditions of the annuity itself. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606 (2013).

For purposes of O.C.G.A. § 44-13-100(a)(2)(E), when determining whether a right to receive payment is on account of age, courts should focus on whether the right to payment is causally connected to the payee's age, not on the payee's intent in purchasing the annuity. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606 (2013).

Exemption of annuity contract. — Chapter 7 debtor's interest in an annuity contract from a life insurance company was not exempt under O.C.G.A. § 44-13-100(a)(2) as it was not a contract to provide benefits in lieu of earnings after retirement or a plan created to fill or supplement a wage or salary void and although the debtor had purchased the annuity in contemplation of retirement, the debtor had made only one contribution shortly before the filing of the bankruptcy case, had discretion to withdraw from the corpus, and had the option to decide at a later time to receive a fixed return on the investment. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911 (Bankr. N.D. Ga. 2005).

Annuity purchased by the debtor was exemptible under O.C.G.A. § 44-13-100(a)(2)(E) because: (i) the debtor intended the annuity to be a wage substitute and evidenced the debtor's intent, not only in testimony, but by the payment option the debtor selected; (ii) the payment option reflected no real return on the debtor's investment but instead an intent to obtain income for the debtor's life; (iii) there was no persuasive evidence that the purchase of the annuity was part of pre-bankruptcy planning; and (iv) the debtor did not have inappropriate control over the annuity. Silliman v. Cassell (In re Cassell), 443 B.R. 200 (Bankr. N.D. Ga. 2010).

Supreme Court of Georgia concludes that in deciding whether a particular annuity is of the type intended to come within the § 44-13-100(a)(2)(E) exemption, the pertinent question is whether the annuity provides income as a substitute for wages and to make that determination, courts must consider the nature of the contract giving rise to the annuity, as well as the facts and circumstances surrounding the purchase of the annuity. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606 (2013).

Debtor's ability to choose among several different plans for investment at the time the debtor purchased the annuity is not significant for exemption purposes under 11 U.S.C. § 522(d)(10)(E), rather, what is relevant and legally significant in that analysis is the nature of the plan actually selected and the level of control a payee retains over the funds and payments thereafter. Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606 (2013).

Annuity did not fit within the scope of O.C.G.A. § 44-13-100 (a)(2)(E). The Annuity was not intended or designed to be a wage substitute; the nature of the annuity and the debtor's control over the annuity aligned the annuity outside the scope of the Georgia exemptions. Wallace v. McFarland (In re McFarland), 500 B.R. 279 (Bankr. S.D. Ga. 2013).

While the debtor may have intended the annuity to provide security for the debtor's wife upon the debtor's death, O.C.G.A. § 44-13-100(a)(2)(E) made clear that the exemption was limited to a debtor's right to receive payment. Wallace v. McFarland (In re McFarland), 500 B.R. 279 (Bankr. S.D. Ga. 2013).

Annuity at issue fell outside the scope of

"annuity" for purposes of O.C.G.A. § 44-13-100(a)(2) because it did not provide income as a substitute for wages. In re Sheffield, 507 B.R. 400 (Bankr. S.D. Ga. 2014).

Bankruptcy court did not clearly err in concluding that the bankruptcy debtor's annuity was not an annuity within the meaning of the annuity exemption because the annuity more closely resembled a nonexempt investment rather than a substitute for wages. McFarland v. Wallace, 516 B.R. 665 (S.D. Ga. 2014).

Annuity payment reasonably necessary for living expenses. — Pension payments were found to be reasonably necessary for the support of the debtors and the debtors' dependents in accordance with O.C.G.A. § 44-13-100(a)(2)(E) under the following circumstances: (i) the debtors documented in the debtors' schedules that the debtors current average monthly income was $4,376; (ii) the debtors' total monthly income included the debtors half of the annuity proceeds in the amount of $1,621; (iii) the debtors listed $4,318 as the average monthly expenses, leaving $58 as the average monthly net income; and (iv) the debtors also had three dependent daughters, and the debtors' schedules showed that the pension payments were relied upon in order to pay the debtors' reasonable and necessary living expenses. Baker v. Penton (In re Penton), No. 12-12167-WHD, 2013 Bankr. LEXIS 1079 (Bankr. N.D. Ga. Feb. 15, 2013).

Exemption of Roth IRAs. — Chapter 7 debtor was permitted to exempt the corpus of her Roth individual retirement account (IRA) under O.C.G.A. § 44-13-100(a)(2)(E) because federal judicial precedent interpreting 11 U.S.C. § 522(d)(10) concluded that the corpus was exempt, that precedent was instructional in determining the Georgia General Assembly's intent at the time the state statute was enacted, the amendments to the state statute regarding traditional IRAs did not preclude a conclusion of exemption as the Roth IRA was not in existence at the time the state statute was amended, and the Roth IRA was clearly a retirement vehicle. Goodman v. Bramlette (In re Bramlette), 333 B.R. 911 (Bankr. N.D. Ga. 2005).

Repayment of retirement loan. — While the retirement account balance on the loan date of filing for bankruptcy is exempt, pursuant to O.C.G.A. § 44-13-100(a)(2.1)(C), only the equity in the account is protected, not voluntary payments to augment that equity. In re Aliffi, 285 B.R. 550 (Bankr. S.D. Ga. 2002).

Exemption denied for Health Savings Account. — Debtor was not entitled to claim the debtor's health savings account (HSA) as exempt because the debtor's HSA was not a substitute for wages, and it was not the type of illness benefit or right to receive payment on account of illness contemplated by O.C.G.A. § 44-13-100(a)(2)(C) and (E). In re Mooney, 503 B.R. 916 (Bankr. M.D. Ga. 2014).

Bankruptcy debtors entitled to exemption in property.

After considering various dictionary definitions of the word "dependent" and Fed. R. Bankr. P. 4003(c), a court concluded that a Chapter 7 trustee failed to carry the burden of proving that the debtors' 22 year-old daughter and grandson were not their "dependents" at the time of the bankruptcy filing to qualify for a residential exemption under O.C.G.A. § 44-13-100(a)(1); the debtors had the presumption of validity in their favor, and the limited evidence on dependency, including the fact that the debtors claimed them as dependents on their income tax return and that the daughter did not have steady employment, supported the conclusion that the daughter and grandson were dependents. In re Holt, 357 B.R. 917 (Bankr. M.D. Ga. 2006).

Chapter 7 debtor was entitled to claim that funds the debtor's employer withheld from the debtor's wages and remitted to a Georgia court were exempt from creditors' claims under O.C.G.A. § 44-13-100(a)(6) because the debtor still had the right at the time the debtor declared bankruptcy to file a traverse under O.C.G.A. § 18-4-93 to an affidavit a creditor filed when the creditor garnished the debtor's wages. Because the debtor retained an interest in the funds, the funds became the property of the debtor's bankruptcy estate under 11 U.S.C. § 541(a)(1) and could be exempted from the creditors'

claims, and a lien the creditor held on the funds could be avoided under 11 U.S.C. § 522(f). In re Williams, 460 B.R. 915 (Bankr. N.D. Ga. 2011).

Creditor failed to meet the creditor's burden of proof with respect to the creditor's objection to a debtor's IRA exemptions as the debtor had funds in a pension plan that were exemptible under the Bankruptcy Code and Georgia law before the debtor's fraudulent acts that gave rise to a nondischargeable debt and, while the debtor subsequently converted the pension funds to IRA accounts, the debtor did not convert non-exempt assets to exempt assets. Santa Ana Unified Sch. Dist. v. Montgomery (In re Montgomery), No. 11-82598-MGD, 2013 Bankr. LEXIS 4295 (Bankr. N.D. Ga. Sept. 18, 2013).

Chapter 7 debtor's cluster of cash withdrawals and checks written to cash immediately preceding the debtor's bankruptcy filing and the debtor's evasive testimony about what the debtor did with the cash strongly implied that the debtor was emptying the debtor's account and hiding cash in anticipation of filing the debtor's case and that the debtor was still in possession of the cash. Thus, the debtor was ordered to turn over the cash, less the debtor's $300 Georgia exemption in money in the debtor's checking account, to the trustee. Overstreet v. Ricks (In re Ricks), No. 13-60100, 2013 Bankr. LEXIS 3355 (Bankr. S.D. Ga. July 15, 2013).

Chapter 13 debtors who purchased a 7.5-acre tract of unimproved land and subsequently gave a creditor a security interest in part of the property were allowed under O.C.G.A. § 44-13-100 to claim both the portion of the property that was encumbered and the portion of the property that was unencumbered as their homestead because the debtors lived in a manufactured home the debtors installed on the property and treated the entire 7.5 acres as the debtors' residence; Georgia bankruptcy courts that had discussed a method for determining whether adjoined parcels of land were part of a debtor's residence had focused on how debtors used the property. Goodman v. Vaughn (In re Vaughn), No. MATTER, 2014 Bankr. LEXIS 2189 (Bankr. N.D. Ga. Apr. 30, 2014).

Bankruptcy debtors not entitled to exemption in property. — Court sustained a Chapter 7 trustee's objection to an exemption in real and personal property for the debtors' block house property after finding no authority in the language of O.C.G.A. § 44-13-100(a)(1) or in case law that allowed them to exempt equity in a property adjacent to their residence that was leased to a residential tenant; clearly, the block house property was not used by the debtors or their dependents as a residence as required by the statute. In re Holt, 357 B.R. 917 (Bankr. M.D. Ga. 2006).

Exemption denied in former residence in which debtor retained a security interest. — Debtor was denied an exemption in the debtor's former residence under O.C.G.A. § 44-13-100(a)(1), since the debtor had sold the property and moved from it, retaining a security interest and receiving monthly payments, as it was no longer the debtor's residence. In re Page, 289 B.R. 484 (Bankr. S.D. Ga. 2003).

Requirement of title ownership in bankruptcy. — Debtor was entitled to claim the $20,000.00 exemption under O.C.G.A. § 44-13-100(a)(1) where the debtor's spouse did not have title to the home and did not file bankruptcy with the debtor; the statute imposed no requirement that the non-titled spouse also be in bankruptcy. In re Burnett, 303 B.R. 684 (Bankr. M.D. Ga. 2003).

Exemption limited where non-resident spouse made no claim to the property. — Trustee's objection to a debtor spouse's Georgia homestead exemption claim under O.C.G.A. § 44-13-100(a)(1) for $17,000.00 was granted because the spouse's exemption was limited to $10,000.00 since: (1) the legislative intent was to protect the resident non-debtor spouse's interest in property where only one spouse filed for bankruptcy and property was titled only in the debtor-spouse, which was not the case in the instant matter; (2) the interpretation urged by the spouse would have allowed each of two debtor spouses to claim a full $20,000.00 exemption in two separate residences so long as they filed two separate bankruptcy cases; and (3) the non-debtor spouse made no claim on the residence. In

re Neary, No. 03-97808, 2004 Bankr. LEXIS 617 (Bankr. N.D. Ga. Apr. 21, 2004).

Bankruptcy debtor not entitled to exemption in note inherited by wife. — Chapter 7 debtor husband was not entitled to an exemption under O.C.G.A. § 44-13-100(a)(6) in a promissory note that the debtor wife inherited from her father because the debtor wife did not by her actions show an intent to convert the note into joint marital property. In re Malia, No. 09-42273-MGD, 2012 Bankr. LEXIS 1104 (Bankr. N.D. Ga. Feb. 7, 2012).

Wife without legal interest in inherited property. — Intention expressed by a husband who was joint debtor, with his wife, in a bankruptcy case under Chapter 13, to convert the proceeds to be received by him upon the sale of real estate in which he had inherited an interest, was an insufficient basis on which to find that the wife was entitled to claim an exemption in those proceeds under O.C.G.A. § 44-13-100(a)(6) (Georgia) and 11 U.S.C. § 522(b) because the nature of the wife's interest therein was fixed as of the date of the Chapter 13 bankruptcy per 11 U.S.C. § 348(f)(1) and on that date, the wife had no legal interest in the inherited property. In re Garner, No. G12-20065-REB, 2012 Bankr. LEXIS 4420 (Bankr. N.D. Ga. July 23, 2012).

Payments to disabled adult in Chapter 13. — Trustee's objection to a debtor's exemption claim per 11 U.S.C. § 522 and O.C.G.A. § 44-13-100(a)(2)(D) (2002) as to payments received from the debtor's deceased father's business interests was sustained because the trustee met the trustee's burden of proof per Fed. R. Bankr. P. 4003, to show that the payments, even if properly deemed, at their inception, to constitute "support" arising from a "domestic relations" order in effect when the debtor was 16 years old, such payments could no longer be considered "support" given that the debtor was 56 years old and the purported obligor was dead. Webster v. Aldrich (In re Aldrich), 403 B.R. 766 (Bankr. M.D. Ga. 2009).

Exemptions exceeding cap. — Chapter 13 trustee's objection to the claimed exemptions in the debtor's checking account, savings account, and three future federal tax refunds was sustained where the amount exceeded the O.C.G.A. § 44-13-100(a)(6) cap by $50.00. In re Myles, No. 05-92125-MHM, 2006 Bankr. LEXIS 863 (Bankr. N.D. Ga. Mar. 8, 2006).

Pursuant to Fed. R. Bankr. P. 1009, a Chapter 7 debtor was not permitted to amend her claim of exemption under O.C.G.A. § 44-13-100(b)(6) after the Chapter 7 trustee had filed an objection and after certain property the debtor claimed was destroyed because to do so would have been inequitable and would have hindered the diligent administration of the bankruptcy estate by the trustee. In re Price, No. 06-62721-MGD, 2006 Bankr. LEXIS 3247 (Bankr. N.D. Ga. Sept. 20, 2006).

When husband and wife debtors sought to exempt their income tax refunds, pursuant to O.C.G.A. § 44-13-100(a)(6), the procedure set forth in In re Crowson, 431 B.R. 484, 489 (10th Cir. B.A.P. 2010) was to be followed. Each debtor was treated separately under 11 U.S.C. § 522(m), and Georgia law had no presumption of equal ownership of property between spouses under O.C.G.A. § 19-3-9. In re Evans, 449 B.R. 827 (Bankr. N.D. Ga. 2010).

Household goods exemption under O.C.G.A. § 44-13-100(a)(4) limited by 11 U.S.C. § 544(f)(4)(A). — Although a debtor's two televisions and two computers both were household goods that could be exempted under O.C.G.A. § 44-13-100(a)(4), a creditor's lien could be avoided only against one television and one computer pursuant to 11 U.S.C. § 544(f)(4)(A). A lawnmower qualified as a household good under state law and federal law, but a camera, while a household good under state law, did not qualify under § 544(f)(4)(A). First Franklin Fin. v. Yawn (In re Yawn), No. 09-21472, 2010 Bankr. LEXIS 486 (Bankr. S.D. Ga. Feb. 5, 2010).

Amendment of exemption. — Debtor was allowed to amend debtor's schedules, after a delay of more than one year, to claim an exemption in a checking account pursuant to O.C.G.A. § 44-13-100(a)(6) and which would have resulted in avoiding a judicial lien where the initial error

in reporting the correct balance in the checking account was the attorney's fault, and thus there was no bad faith on the debtor's part; the creditor would not have been prejudiced as the debtor would have reaped the same benefit from amending the schedules that the debtor would have received had the debtor filed the amendments a year ago. In re Spice, No. 03-43255-JDW, 2005 Bankr. LEXIS 3144 (Bankr. M.D. Ga. July 11, 2005).

Construction. — Use of the word "may" in O.C.G.A. § 44-13-100 denotes the fact that when a debtor files bankruptcy the debtor is not required to exempt any property; however, once the debtor chooses to exempt property, the debtor is limited to exemptions set forth in O.C.G.A. § 44-13-100. When two statutes conflict, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent. In re Sapp, No. 11-30468, 2012 Bankr. LEXIS 2773 (Bankr. S.D. Ga. June 15, 2012).

RESEARCH REFERENCES

ALR. — Jewelry and clothing as within debtor's exemptions under state statutes, 44 ALR6th 481.

Construction and application of exemption for firearms under state law, 46 ALR6th 401.

44-13-107. Exempted property subject to levy and sale for purchase money and taxes.

JUDICIAL DECISIONS

Lien survives discharge. — When a debtor filed the debtor's 2008 state income tax return four days after the filing of the debtor's Chapter 7 case, the debtor's tax liability for that year was excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i). Even though the debtor's liability for the year 2007 was subject to discharge, the Georgia Department of Revenue's tax lien survived the discharge and attached to any exempt property of the debtor. Wellborn v. Ga. Dep't of Revenue (In re Wellborn), No. 12-2083, 2012 Bankr. LEXIS 4632 (Bankr. N.D. Ga. Aug. 20, 2012).

ARTICLE 3

DOMESTICATED JUDGMENT

Effective date. — This article became effective July 1, 2004.

44-13-120. Rights of Georgia residents.

As against a domesticated judgment from another state, a judgment debtor resident in Georgia shall be entitled to assert, in addition to any other exemption under Georgia law, an exemption from levy and sale and any other process equal to the exemption which would be provided to the judgment debtor by the law of the state in which the judgment was entered if the judgment debtor were a resident of that state. (Code 1981, § 44-13-120, enacted by Ga. L. 2004, p. 451, § 1.)

CHAPTER 14

MORTGAGES, CONVEYANCES TO SECURE DEBT, AND LIENS

Article 1

In General

Sec.

44-14-3. Furnishing of cancellation by grantee or holder upon payment; liability for failure to comply; cancellation of instrument after failure to comply; liability of agents.

44-14-4. Procedure for recording cancellation of mortgage.

44-14-13. Disbursement of settlement proceeds; delivery of loan funds to settlement agent by lender; damages.

44-14-14. Vacant and foreclosed real property registries; definitions; fees and penalties for registration.

44-14-15. Fee for a future conveyance; limited circumstances.

Article 2

Mortgages

44-14-33. Attestation or acknowledgment of mortgage; additional witness in case of land; constructive notice.

44-14-34. Signing of mortgages executed outside state.

44-14-37. Effect of failure to record [Repealed].

44-14-38. Admission of mortgages into evidence [Repealed].

Article 3

Conveyances to Secure Debt and Bills of Sale

Part 1

In General

44-14-61. Signing of deeds to secure debt and bills of sale — Generally.

44-14-62. Signing of deeds to secure debt and bills of sale — Out-of-state deeds to secure debt and bills of sale.

44-14-63. Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.

44-14-65. Fees for transfer of real property covered by deed to secure debt [Repealed].

Article 7

Foreclosure

Part 1

In General

44-14-160. Filing of foreclosure and deed under power; penalty for late payment.

44-14-162. Sales made on foreclosure under power of sale — Manner of advertisement and conduct necessary for validity; filing.

44-14-162.2. Sales made on foreclosure under power of sale — Mailing or delivery of notice to debtor — Procedure.

44-14-162.3. Sales made on foreclosure under power of sale — Waiver or release of notice requirement.

44-14-162.4. Sales made on foreclosure under power of sale — Recitals in deeds as to meeting of notice requirement.

Part 4

Foreclosures on Personalty

Subpart 4

Foreclosures in Magistrate Court

44-14-302. Levy and sale of property; advertisement.

Article 8

Liens

Part 2

Landlords

Sec.
44-14-349. Priority of liens affecting manufactured and mobile homes.

Part 3

Mechanics and Materialmen

44-14-360. Definitions.
44-14-361. Creation of liens; property to which lien attaches; items to be included in lien.
44-14-361.1. How liens declared and created; amendment; record; commencement of action; notice; priorities; parties; limitation on aggregate amount of liens.
44-14-361.5. Liens of persons without privity of contract.
44-14-363. Special liens on personalty; notice; enforcement; priorities; maximum claims for storage; recordation.
44-14-364. Release of lien on approval of bond; amount; real property bonds; schedule, affidavit, and recordation; superior court clerk held harmless for good faith discretionary acts in connection with bond approval.
44-14-366. Waiver of lien or claim upon bond in advance of furnishing labor, services, or materials void; interim waiver and release upon payment; unconditional waiver and release upon final payment; affidavit of nonpayment.
44-14-367. Notice; required statement.
44-14-368. Notice of contest of lien.
44-14-369. Computation of certain time periods.

Part 8

Hospitals and Nursing Homes

44-14-470. Lien on causes of action accruing to injured person for costs of care and treatment of injuries arising out of such causes of action.
44-14-471. Filing of verified statement; contents; notice.
44-14-472. Duties of clerk; lien book; fee.
44-14-473. Effect of covenant not to bring an action; action to enforce lien; limitation; affidavit of payment.
44-14-475. Effect of part on settlement before entry into hospital, nursing home, or traumatic burn care medical facility.
44-14-476. No independent right of action.

Part 9

Veterinarians and Boarders of Animals

44-14-490. Lien for treatment, board, or care of animal; right to retain possession.

Part 10

Miscellaneous Liens

44-14-518. Liens on aircraft or aircraft engines for labor and materials and for contracts of indemnity.

JUDICIAL DECISIONS

Foreclosure of lien on mare. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to colt possessors in a tortious interference with a contract claim by a horse trainer, wherein the trainer alleged that the trainer had a contract to keep the recently born colt in exchange for continued services to the mare's owner; the court found that there was no showing that the possessors were aware of a contract regarding the ownership of the colt, the possess-

ors had followed the necessary procedures for filing a financing statement under O.C.G.A. § 11-9-501 et seq., they had allegedly foreclosed on their lien on the mare by the time that they became aware of the trainer's claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant to O.C.G.A. § 44-14-511. Medlin v. Morganstern, 268 Ga. App. 116, 601 S.E.2d 359 (2004).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Warranty Deed Intended as Mortgage, 4 POF2d 567.

Proof That Grantor Intended Deed as Mortgage, 79 POF3d 109.

Am. Jur. Trials. — Prospective Purchaser's Recovery of Damages for Tortuous Interference with Real Estate Contract, 97 Am. Jur. Trials 107.

Real Estate Broker's Breach of Fiduciary Duty to Disclose Material Facts to Seller-Principal, 101 Am. Jur. Trials 1.

ARTICLE 1

IN GENERAL

44-14-1. Operation of "open-end" clauses; limited to ex contractu obligations between parties.

JUDICIAL DECISIONS

Limitation on dragnet clauses.

In distributing insurance proceeds following the postpetition destruction of Chapter 13 debtors' home, a dragnet clause in the security agreement did not preclude the bank from retaining amounts owed on the debtors' prior notes under O.C.G.A. § 44-14-1(b). The security deed demonstrated a clear intent for the real estate to secure the individual liabilities of the debtors. In re Ryles, 457 B.R. 138 (Bankr. M.D. Ga. 2011).

44-14-3. Furnishing of cancellation by grantee or holder upon payment; liability for failure to comply; cancellation of instrument after failure to comply; liability of agents.

(a) As used in this Code section, the term:

(1) "Account" means the loan, note, or other such agreement executed by the parties.

(2) "Finance charge" means interest and other charges agreed to by the parties.

(3) "Grantee" means heirs, devisees, executors, administrators, successors, transferees or assigns, and any servicing agent or any person or entity to whom indebtedness is paid on behalf of or by any grantor.

(4) "Grantor" means heirs, devisees, executors, administrators, successors, transferees, or assigns.

(5) "Instrument" means a deed to secure debt, a security instrument, a purchase money mortgage, a financing statement, a personalty mortgage, a loan contract, or other instrument executed in connection with any loan.

(6) "Revolving loan account" means an arrangement between a lender and a debtor for the creation of debt pursuant to an agreement secured by an instrument and under which:

(A) The lender may permit the debtor to create debt from time to time;

(B) The unpaid balances of principal of such debt and the loan finance and other appropriate charges are debited to an account;

(C) A loan finance charge is computed on the outstanding balances of the debtor's account from time to time;

(D) The debtor agrees to repay the debt and accrued finance charges in accordance with the written agreement with the lender; and

(E) The limitation on the maximum amount which the debtor is entitled to become indebted under said arrangement between the lender and debtor is stated on the face of the instrument, and said amount shall be deemed to be notice of the maximum amount secured by the instrument.

(b)(1) Whenever the indebtedness secured by any instrument is paid in full, the grantee or holder of the instrument, within 60 days of the date of the full payment, shall cause to be mailed to the grantor, at the grantor's last known address as shown on the records of the grantee or holder of the instrument, written notice of the grantee's or holder of the instrument's transmittal of notice of satisfaction or cancellation as required by this subsection and notice of the grantor's right to demand payment of $500.00 in liquidated damages from the grantee or holder of the instrument if such obligation is not timely met.

(2) Whenever the indebtedness secured by any instrument is paid in full, the grantee or holder of the instrument, within 60 days of the date of the full payment, shall cause to be furnished to the clerk of the superior court of the county or counties in which the instrument is recorded a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record. The grantee or holder of the instrument shall further direct the clerk of the court to transmit to the grantor the original cancellation or satisfaction document at the grantor's last known address as shown on the records of the grantee or holder of the instrument. In the case of a revolving loan account, the debt shall be considered to be "paid in

full" only when the entire indebtedness including accrued finance charges has been paid and the lender or debtor has notified the other party to the agreement in writing that he or she wishes to terminate the agreement pursuant to its terms.

(3) Notwithstanding paragraph (2) of this subsection, if an attorney at law remits the pay-off balance of an instrument to a grantee or holder of the instrument on behalf of a grantor, the grantee or holder of the instrument may direct the clerk of the court to transmit to such attorney the original cancellation or satisfaction document.

(4) A grantee or holder of the instrument shall be authorized to add to the pay-off amount the costs of recording a cancellation or satisfaction of an instrument.

(c)(1) Upon the failure of the grantee or holder of the instrument to transmit a legally sufficient satisfaction or cancellation as required by subsection (b) of this Code section, the grantee or holder of the instrument shall be liable to the grantor for the sum of $500.00 as liquidated damages and such additional sums for any loss caused to the grantor, plus reasonable attorney's fees if the grantor makes a written demand for liquidated damages to the grantee or holder of the instrument before transmittal, but not less than 61 days after the instrument is paid in full, and prior to filing a civil action.

(2) The grantee or holder of the instrument shall not be liable to the grantor if he or she demonstrates reasonable inability to comply with subsection (b) of this Code section; and the grantee or holder shall not be liable to the grantor unless and until a written demand for the liquidated damages as provided in subsection (b) of this Code section is made. No settlement agent or attorney may take an assignment of the right to the $500.00 in liquidated damages.

(3) Except as provided in paragraph (1) of subsection (b) and paragraph (2) of subsection (c) of this Code section, no other provision of this Code section shall be construed so as to affect the obligation of the grantee or holder of the instrument to pay the liquidated damages provided for in this subsection.

(4) At least 15 business days prior to filing a civil action to recover liquidated damages, the grantor shall provide notice in writing to the grantee or holder of the instrument at the address where the grantee or holder of the instrument directs payments to be mailed with respect to the indebtedness secured by the instrument or, if such address is not available, at the address of the grantee or holder of the instrument's registered agent for service of process in Georgia stating that the grantee or holder of the instrument:

(A) Has failed to comply with the obligation required by this Code section;

(B) Owes the grantor liquidated damages in the amount of $500.00; and

(C) May be sued by the grantor for the failure to comply with the provisions of this Code section.

(5) If the grantee or holder of the instrument fails to provide written notice to the grantor regarding the grantee's or holder of the instrument's obligation for transmittal as provided in paragraph (1) of subsection (b) of this Code section, the grantor may file a civil action at any time more than 60 days after the grantee's or holder of the instrument's receipt of full payment.

(c.1) In the event that a grantee or holder of record has failed to transmit properly a legally sufficient satisfaction or cancellation to authorize and direct the clerk or clerks to cancel the instrument of record within 60 days after a written notice mailed to such grantee or holder of record by registered or certified mail or statutory overnight delivery, return receipt requested, the clerk or clerks are authorized and directed to cancel the instrument upon recording an affidavit by an attorney who has caused the secured indebtedness to be paid in full or by an officer of a regulated or chartered financial institution whose deposits are federally insured if that financial institution has paid the secured indebtedness in full. The notice to be mailed to the grantee or holder of record shall identify the indebtedness and include a recital or explanation of this subsection. The affidavit shall include a recital of actions taken to comply with this subsection. Such affidavit shall include as attachments the following items:

(1) A written verification which was given at the time of payment by the grantee or holder of record of the amount necessary to pay off such loan; and

(2)(A) Copies of the front and back of a canceled check to the grantee or holder of record paying off such loan.

(B) Confirmation of a wire transfer to the grantee or holder of record paying off such loan.

(C) A bank receipt showing payment to the grantee or holder of record of such loan.

Any person who files an affidavit in accordance with this subsection which affidavit is fraudulent shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than three years or by a fine of not less than $1,000.00 nor more than $5,000.00, or both.

(d) In all cases, any servicing agent or any person or entity to whom the indebtedness is paid on behalf of any grantee shall be responsible

for notifying the holder thereof upon payment in full and for securing the satisfaction or cancellation as provided in this Code section; and, upon failure to do so, the servicing agent or payee shall be subject to the same liability as provided in this Code section. (Ga. L. 1975, p. 1134, §§ 1, 2; Ga. L. 1983, p. 677, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 754, § 1; Ga. L. 1987, p. 3, § 44; Ga. L. 1991, p. 413, §§ 1, 2; Ga. L. 1998, p. 545, § 1; Ga. L. 1999, p. 862, §§ 2, 3; Ga. L. 2000, p. 136, § 44; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 352, § 1/HB 1093.)

The 2008 amendment, effective May 12, 2008, inserted "of the instrument" throughout subsections (b) and (c); in subsection (b), added paragraph (b)(1), redesignated former paragraphs (b)(1) through (b)(3) as present paragraphs (b)(2) through (b)(4), respectively, in paragraph (b)(2), inserted "or she" near the end of the last sentence, and, in paragraph (b)(3), substituted "paragraph (2)" for "paragraph (1)"; and rewrote subsection (c). See the Editor's note for applicability.

Editor's notes. — Ga. L. 2008, p. 352, § 2, not codified by the General Assembly, provides, in part, that a demand for liquidated damages made before May 12, 2008 shall be governed by the provisions of former Code Section 44-14-3.

Law reviews. — For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008).

JUDICIAL DECISIONS

Statutory obligation to cancel satisfied notes. — Trial court correctly ordered that security deed be satisfied and canceled of record as the uncontroverted evidence was that the different former property owner paid the different former property owner's debt to the security deed holder but the security deed holder never canceled the security deed; however, once the security deed was satisfied, the security deed holder had a statutory obligation to cancel that instrument. Lebbos v. Davis, 256 Ga. App. 1, 567 S.E.2d 345 (2002).

The trial court, having found a debt to have been forgiven upon a decedent's death, did not err in ordering the decedent's administrator to cancel a deed to secure debt. The litigation did not give notice to the public that the deed had been cancelled; under O.C.G.A. §§ 44-14-3(b) and 44-14-60, a grantee of a security deed had the duty to cancel the deed of record when the obligation was satisfied. Mize v. Woodall, 291 Ga. App. 349, 662 S.E.2d 178 (2008).

Lender improperly removed a borrower's action under 28 U.S.C. §§ 1446(b) and 1453(a) because the lender failed to meet its burden to establish that the number of borrowers who paid off their loans and whose security deeds were not timely cancelled under former O.C.G.A. § 44-14-3(b) met the requirements of the Class Action Fairness Act of 2005, making remand necessary under 28 U.S.C. § 1447(c). Stroh v. Colonial Bank, N.A., No. 4:08-CV-73 (CDL), 2008 U.S. Dist. LEXIS 89540 (M.D. Ga. Nov. 4, 2008).

Application of definition of grantee. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as lender's nominee, to secure the debt, the grantee was not a grantee, within the meaning of O.C.G.A. § 44-14-3(a), because the definition of "grantee" in § 44-14-3(a) did not apply to any other Code section. Drake v. Citizens Bank (In re Corley), 447 B.R. 375 (Bankr. S.D. Ga. 2011).

Standing was in new purchaser of property. — Former property owner lacked standing to bring an action for statutory damages and attorney fees under O.C.G.A. § 44-14-3(c) against a lender that failed to cancel the lender's security deed on the property after receiving a payoff of the loan as the owner no longer had an interest in the property at the time

that the complaint was filed and, accordingly, the owner was not the real party in interest under O.C.G.A. § 9-11-17(a); the new purchaser of the property became "the grantor" that had the capacity to prosecute the claim pursuant to § 44-14-3(a)(4). Associated Credit Union v. Pinto, 297 Ga. App. 605, 677 S.E.2d 789 (2009).

Notice. — When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, the creditor's failure to do so fell squarely under O.C.G.A. § 44-14-3(c), and the notice requirements found in O.C.G.A. § 44-14-3(c.1) had no application, as (1) the two sections concerned different matters, (2) each had a distinct notice requirement, and (3) O.C.G.A. § 44-14-3(c) specifically provided that no other provision of O.C.G.A. § 44-14-3 was to be construed to limit a creditor's obligation to pay a debtor liquidated damages for violating O.C.G.A. § 44-14-3(c). Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

Borrower waived and released its claim for violation. — Although a lender had failed to timely release two subdivision lots from its deed to secure debt as required by O.C.G.A. § 44-14-3, the lender was not liable to the borrower because, after the lots sold, the borrower signed loan modification agreements releasing and waiving any claims it might have against the lender. Heritage Creek Dev. Corp. v. Colonial Bank, 268 Ga. App. 369, 601 S.E.2d 842 (2004).

Demand for liquidated damages. — Because the borrower never specifically demanded liquidated damages, the borrower was not entitled to statutory damages for the lender's failure to timely cancel a security deed. Shree Annpurna, Inc. v. Udhwani, 255 Ga. App. 799, 567 S.E.2d 42 (2002).

In an action for damages, O.C.G.A. § 9-11-8(a)(2)(B), part of the Civil Practice Act (CPA), requires a written demand in the complaint for the damages requested; thus, if a court were to interpret O.C.G.A. § 44-14-3(c) as permitting a demand for liquidated damages to be made in the complaint, the section would have no real meaning because the CPA already imposes such a requirement. Accordingly, if O.C.G.A. § 44-14-3(c) is to serve any real purpose, it must be construed as a requirement that a grantor make a written demand on the grantee for the liquidated damages as a condition precedent to creating the liability that serves as the basis for a lawsuit. SunTrust Bank v. Hightower, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

A complaint by a borrower against a lender for liquidated damages under O.C.G.A. § 44-14-3(c) should have been dismissed because the borrower failed to make a written demand for such damages before filing suit. If the statute was to serve any real purpose, the statute had to be construed as imposing such a requirement. SunTrust Bank v. Hightower, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

Attorney fees. — When a debtor paid a promissory note and demanded that the creditor record the note's satisfaction, but the creditor sued the debtor on the note four years later, the debtor was entitled to attorney fees, including fees incurred in defending against the creditor's action, which was directly related to the creditor's failure to comply with O.C.G.A. § 44-14-3(c). Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

Penalties were appropriate. — When a debtor paid a promissory note and gave the creditor a written demand to record the note's satisfaction, but, instead, the creditor sued the debtor on the note four years later, the creditor's actions and omissions fell squarely within O.C.G.A. § 44-14-3(c), and it was liable to the debtor for statutory damages under that section. Franklin Credit Mgmt. Corp. v. Friedenberg, 275 Ga. App. 236, 620 S.E.2d 463 (2005).

44-14-4. Procedure for recording cancellation of mortgage.

Any mortgagor who has paid off his or her mortgage may present the paid mortgage to the clerk of the superior court of the county or counties

in which the mortgage instrument is recorded, together with the order of the mortgagee or transferee directing that the mortgage be canceled. After payment of the fee authorized by law, the clerk shall index and record, in the same manner as the original mortgage instrument is recorded, the canceled and satisfied mortgage instrument or such portion thereof as bears the order of the mortgagee or transferee directing that the mortgage be canceled, together with any order of the mortgagee or transferee directing that the mortgage be canceled. The clerk shall show on the index of the cancellation and on the cancellation document the deed book and page number where the original mortgage instrument is recorded. The clerk shall manually or through electronic means record across the face of the mortgage instrument the words "satisfied" and "canceled" and the date of the entry and shall sign his or her name thereto officially. The clerk shall also manually or electronically make a notation on the record of the mortgage to indicate where the order of the cancellation is recorded. (Ga. L. 1884-85, p. 129, §§ 1, 2; Civil Code 1895, §§ 2737, 2738; Civil Code 1910, §§ 3270, 3271; Code 1933, § 67-117; Ga. L. 1963, p. 276, § 1; Ga. L. 1989, p. 498, § 1; Ga. L. 2012, p. 173, § 1-36/HB 665.)

The 2012 amendment, effective July 1, 2012, inserted "or her" in the first sentence; in the fourth sentence, inserted "manually or through electronic means" near the beginning, and inserted "or her" near the end; and inserted "manually or electronically" in the last sentence.

44-14-10. Search for property where defendant has no permanent abode; venue of prosecution.

JUDICIAL DECISIONS

Cited in Taylor, Bean, & Whitaker Mortg. Corp. v. Brown, 276 Ga. 848, 583 S.E.2d 844 (2003).

44-14-12. Deceiving as to existence of lien; making second deed of conveyance; penalty.

JUDICIAL DECISIONS

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009).

44-14-13. Disbursement of settlement proceeds; delivery of loan funds to settlement agent by lender; damages.

(a) As used in this Code section, the term:

(1) "Borrower" means the maker of the promissory note evidencing the loan to be delivered at the loan closing.

(2) "Collected funds" means funds deposited, finally settled, and credited to the settlement agent's escrow account.

(3) "Disbursement of settlement proceeds" means the payment of all proceeds of the transaction by the settlement agent to the persons entitled thereto.

(4) "Lender" means any person or entity regularly engaged in making loans secured by mortgages or deeds to secure debt on real estate.

(5) "Loan closing" means the time agreed upon by the borrower and the lender when the execution and delivery of loan documents by the borrower occurs.

(6) "Loan documents" means the note evidencing the debt due to the lender, the deed to secure debt or mortgage securing the debt due to the lender, and any other documents required by the lender to be executed by the borrower as part of the transaction.

(7) "Loan funds" means the gross or net proceeds of the loan to be disbursed by or on behalf of the lender at the loan closing.

(8) "Party" or "parties" means the seller, purchaser, borrower, lender, and settlement agent, as applicable to the subject transaction.

(9) "Settlement" means the time when the settlement agent has received the duly executed deed to secure debt and other loan documents and funds required to carry out the terms of the contracts between the parties.

(10) "Settlement agent" means the lender or an active member of the State Bar of Georgia responsible for conducting the settlement and disbursement of the settlement proceeds.

(b) This Code section shall apply only to transactions involving purchase money loans made by a lender, or refinance loans made by the current or a new lender, which loans will be secured by deeds to secure debt or mortgages on real estate within the State of Georgia containing not more than four residential dwelling units, whether or not such deeds to secure debt or mortgages have a first-priority status.

(c) Except as otherwise provided in this Code section, a settlement agent shall not cause a disbursement of settlement proceeds unless

such settlement proceeds are collected funds. A settlement agent may disburse settlement proceeds from its escrow account after receipt of any of the following negotiable instruments even though the same are not collected funds:

(1) A cashier's check, as defined in subsection (g) of Code Section 11-3-104, from a federally insured bank, savings bank, savings and loan association, or credit union and issued by a lender for a closing or loan transaction, provided that such funds are immediately available and cannot be dishonored or refused when negotiated or presented for payment;

(2) A check drawn on the escrow account of an attorney licensed to practice law in the State of Georgia or on the escrow account of a real estate broker licensed under Chapter 40 of Title 43, if the settlement agent has reasonable and prudent grounds to believe that the check will constitute collected funds in the settlement agent's escrow account within a reasonable period;

(3) A check issued by the United States of America or any agency thereof or the State of Georgia or any agency or political subdivision, as such term is defined in Code Section 50-15-1, of the State of Georgia; or

(4) A check or checks in an aggregate amount not exceeding $5,000.00 per loan closing.

For purposes of this Code section, the instruments described in paragraphs (1) through (4) of this subsection are negotiable instruments if they are negotiable in accordance with the provisions of Code Section 11-3-104.

(d) The lender shall at or before the loan closing deliver loan funds to the settlement agent in the form of collected funds or in the form of a negotiable instrument described in subsection (c) of this Code section; provided, however, that in the case of refinancing, or any other loan where a right of rescission applies, the lender shall, prior to the disbursement of the settlement proceeds and no later than 11:00 A.M. eastern standard time or eastern daylight time, whichever is applicable, of the next business day following the expiration of the rescission period required under the federal Truth in Lending Act (15 U.S.C. Section 1601, et seq.), deliver loan funds to the settlement agent in one or more of the forms set forth in this Code section.

(e) Any party violating this Code section shall be liable to any other party suffering a loss due to such violation for such other party's actual damages plus reasonable attorneys' fees. In addition, any party violating this Code section shall pay to the party suffering the loss an amount of money equal to $1,000.00 or double the amount of interest payable on the loan for the first 60 days after the loan closing, whichever is greater.

(f) Any individual, corporation, partnership, or other entity conducting the settlement and disbursement of loan funds, when he, she, or it is not the settlement agent, shall be guilty of a misdemeanor.

(g) Nothing contained in this Code section shall prevent a real estate broker or real estate salesperson from exercising the rights and providing the duties and services specified by Chapter 40 of Title 43. (Code 1981, § 44-14-13, enacted by Ga. L. 1990, p. 1653, § 1; Ga. L. 2008, p. 796, § 1/SB 355; Ga. L. 2012, p. 1099, § 15/SB 365.)

The 2008 amendment, effective July 1, 2008, rewrote subsection (c) and substituted the present provisions of subsection (d) for the former provisions which read: "The lender shall at or before the loan closing deliver loan funds to the settlement agent either in the form of collected funds or in the form of a negotiable instrument described in any of paragraphs (1) through (3) of subsection (c) of this Code section, provided that the lender must cause such instrument to be honored upon presentment for payment to the bank or other depository institution upon which such instrument was drawn.". See the Editor's note for applicability.

The 2012 amendment, effective July 1, 2012, in paragraph (a)(10), substituted "lender or an active member of the State Bar of Georgia" for "person" near the beginning and deleted "and includes any individual, corporation, partnership, or other entity conducting the settlement and disbursement of the loan funds" following "proceeds" at the end; in subsection (b), substituted "shall apply" for "applies" near the beginning, substituted "refinance loans made by the current or a new lender" for "loans made to refinance, directly or indirectly, a purchase money loan made by another lender" in the middle, and inserted "within the State of Georgia"; substituted "party suffering the loss" for "borrower" in the second sentence of subsection (e); and added subsections (f) and (g).

Editor's notes. — Ga. L. 2008, p. 796, § 2, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to all loans closed on or after July 1, 2008.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012). For annual survey on real property, see 66 Mercer L. Rev. 151 (2014).

JUDICIAL DECISIONS

Real estate closings. — If a lawyer receives funds at a real estate closing on behalf of a client or in any other fiduciary capacity the lawyer must deposit the funds into, and administer the funds from, a trust account in accordance with Ga. St. Bar R. 4-102(d):1.15(II). Georgia law also allows the lender to disburse funds, O.C.G.A. § 44-14-13(a)(10), but a lawyer may not deliver closing proceeds to a title company or a third party settlement company for disbursement instead of disbursing the funds from an attorney escrow account. In re Formal Advisory Opinion No. 13-1, 295 Ga. 749, 763 S.E.2d 875 (2014).

44-14-14. Vacant and foreclosed real property registries; definitions; fees and penalties for registration.

(a) For purposes of this Code section, the term:

(1) "Agent" means an individual with a place of business in this state at which he or she is authorized to accept inquiries, notices, and

service of process on behalf of a vacant or foreclosed real property owner.

(2) "Department" means the Department of Community Affairs.

(3) "Foreclosed real property" means improved or unimproved real property held pursuant to a judicial or nonjudicial foreclosure of a mortgage, deed of trust, security deed, deed to secure debt, or other security instrument securing a debt or obligation owed to a creditor or a deed in lieu of foreclosure in full or partial satisfaction of a debt or obligation owed to a creditor.

(4) "Street address" means the street or route address. Such term shall not mean or include a post office box.

(5) "Vacant real property" means real property that:

(A) Is intended for habitation, has not been lawfully inhabited for at least 60 days, and has no evidence of utility usage within the past 60 days; or

(B) Is partially constructed or incomplete, without a valid building permit.

Such term shall not include a building or structure containing multiple units with common ownership that has at least one unit occupied with evidence of utility usage.

(b) Effective July 1, 2012:

(1) A county or municipal corporation may establish by ordinance or resolution for the requirement of registration of vacant or foreclosed real property as provided in this Code section;

(2) Notwithstanding county or municipal ordinances or resolutions that require registration for repeated ordinance violations that remain uncorrected for at least 90 days, no county or municipal corporation shall require registration of vacant property or real property that is unoccupied, uninhabited, abandoned, foreclosed, or advertised for foreclosure on any basis other than as set forth in this Code section or as may be otherwise authorized by general law; and

(3) No county or municipal corporation shall require for purposes of a vacant or foreclosed real property registry established pursuant to this Code section any information or documentation other than as set forth in this Code section.

Any requirements of a vacant or foreclosed real property registry established by a county or municipal ordinance or resolution in effect as of July 1, 2012, that are in conflict with the requirements of this Code section shall be hereby preempted.

(c) Each registrant shall be required to file with a specifically identified office or officer a registration form, in paper or electronic format, as required by the county or municipal corporation, requiring submission of only the following information:

(1) The real property owner's name, street address, mailing address, phone number, facsimile number, and e-mail address;

(2) The agent's name, street address, mailing address, phone number, facsimile number, and e-mail address;

(3) The real property's street address and tax parcel number;

(4) The transfer date of the instrument conveying the real property to the owner; and

(5) At such time as it becomes available, recording information, including deed book and page numbers, of the instrument conveying the real property to the owner.

(d) The department may promulgate a standard vacant or foreclosed real property registry form that requires only the information set forth in subsection (c) of this Code section, in paper and electronic format. If such form is promulgated by the department, all counties and municipal corporations with a vacant or foreclosed real property registry shall use such form.

(e)(1) When any real property is acquired by foreclosure under power of sale pursuant to Code Section 44-14-160 or acquired pursuant to a deed in lieu of foreclosure and:

(A) The deed under power of sale or deed in lieu of foreclosure contains the information specified in paragraphs (1) through (5) of subsection (c) of this Code section;

(B) The deed is filed with the clerk of superior court within 60 days of the foreclosure sale or transfer of the deed in lieu of foreclosure; and

(C) Proof of the following is provided to the office or officer in charge of the county or municipal foreclosed real property registry:

(i) A filing date stamp or a receipt showing payment of the applicable filing fees; and

(ii) The entire deed under power of sale or entire deed in lieu of foreclosure,

a county or municipal corporation shall not require the transferee to register such foreclosed real property pursuant to this Code section or the payment of any administrative fees pursuant to subsection (h) of this Code section.

(2) No county or municipal corporation may require registration of vacant or foreclosed real property pursuant to this Code section within 90 days of such real property's transfer:

(A) Pursuant to a deed under power of sale or deed in lieu of foreclosure; or

(B) To the first subsequent transferee after the vacant real property has been acquired by foreclosure under power of sale pursuant to Code Section 44-14-160 or acquired pursuant to a deed in lieu of foreclosure.

(f) An ordinance or resolution establishing a registry pursuant to this Code section may require a vacant or foreclosed real property owner to update the information specified in paragraphs (1) through (5) of subsection (c) of this Code section within 30 days after any change in such required information regardless of whether the information provided to the registry was in the deed under power of sale or deed in lieu of foreclosure.

(g) A vacant or foreclosed real property owner, or the agent of such owner, may apply to remove such vacant or foreclosed real property from the registry at such time as the real property no longer constitutes vacant or foreclosed real property. The county or municipal corporation shall grant or deny such application within 30 days, and if no such determination is made within 30 days, the application shall be deemed granted.

(h) An ordinance or resolution establishing a vacant or foreclosed real property registry may require the payment of administrative fees for registration which shall reasonably approximate the cost to the county or municipal corporation of the establishment, maintenance, operation, and administration of the registry. Such fees shall not exceed $100.00 per registration.

(i) An ordinance or resolution establishing a vacant or foreclosed real property registry may require penalties for failure to register or failure to update the information specified in paragraphs (1) through (5) of subsection (c) of this Code section, provided that such penalties shall not exceed $1,000.00.

(j) A county or municipal ordinance or resolution requiring the registration of vacant or foreclosed real property shall provide for administrative procedures. The administrative procedures shall include the right to appeal to the municipal or recorder's court in the city where the vacant or foreclosed real property is located or to the magistrate or recorder's court of the county in which the vacant or foreclosed real property is located, subject to applicable jurisdictional requirements. Any vacant or foreclosed real property owner affected by

a county or municipal ordinance or resolution requiring vacant or foreclosed real property registration may challenge any determination made pursuant to such ordinance or resolution.

(k) An ordinance or resolution adopted by the governing authority of a county to establish a registry pursuant to this Code section may, subject to and in accordance with the requirements of this Code section, require registration of vacant or foreclosed real property within the entire territory of the county, except territory located within the boundaries of any municipal corporation, unless otherwise allowed by intergovernmental agreement between the county and municipal corporation.

(l) Nothing in this Code section shall be construed to prohibit a county or municipal ordinance or resolution requiring the registration of vacant or foreclosed real property from providing for exemptions from such registration.

(m) Nothing in this Code section shall be construed to impair, limit, or preempt in any way the power of a county or municipal corporation to enforce any applicable codes, as defined in Code Section 42-2-8, or to define or declare nuisances and to cause their removal or abatement by summary proceedings or otherwise.

(n) Notwithstanding Code Section 36-74-30, an ordinance or resolution establishing a vacant or foreclosed real property registry may require the registration of residential rental property if such property is vacant or foreclosed real property. (Code 1981, § 44-14-14, enacted by Ga. L. 2012, p. 656, § 1/HB 110; Ga. L. 2013, p. 634, § 2/HB 160.)

Effective date. — This Code section became effective July 1, 2012.

The 2013 amendment, effective July 1, 2013, deleted "for which a land disturbance permit has been issued by a county or municipal corporation and is" following "real property" near the beginning of paragraph (a)(3); and substituted "foreclosure sale or transfer of the deed in lieu of foreclosure" for "transfer" at the end of subparagraph (e)(1)(B).

Law reviews. — For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

44-14-15. Fee for a future conveyance; limited circumstances.

(a) As used in this Code section, the term "conveyance of real property" means a conveyance or other transfer of an interest or estate in real property.

(b) A restriction or covenant running with the land applicable to the conveyance of real property that requires a transferee or transferor of real property, or the transferee's or transferor's heirs, successors, or assigns, to pay a declarant, other person imposing the restriction or covenant on the property, or a third party designated by such declarant or other person, or a successor, assignee, or designee of such declarant,

third party, or other person, a fee in connection with a future transfer of the property shall be prohibited. A restriction or covenant running with the land that violates this Code section or a lien purporting to encumber the land to secure a right under a restriction or covenant running with the land that violates this Code section shall be void and unenforceable.

(c) This Code section shall not apply to a restriction or covenant that requires a fee associated with the conveyance of real property to be paid to:

(1) An association formed for the purposes of exercising the powers of the association of any condominium created pursuant to Article 3 of Chapter 3 of this title, the "Georgia Condominium Act";

(2) A property owners' association formed for the purposes of exercising the powers of the property owners' association pursuant to Article 6 of Chapter 3 of this title, the "Georgia Property Owners' Association Act";

(3) A property owners' association formed for the purposes of exercising the powers of an association of property owners that has not been formed pursuant to or which has not adopted the provisions of Article 6 of Chapter 3 of this title, the "Georgia Property Owners' Association Act," provided that such association shall comply with subsection (d) of Code Section 44-3-232;

(4) A person or entity under the general supervision of the Public Service Commission as provided for in subsection (a) of Code Section 46-2-20, provided that such fee is charged for expenses incurred in the administration of ongoing services or rights provided to the property interest conveyed;

(5) A community land trust or community development corporation that is tax-exempt under Section 501(c) (3) or 501(c) (4) of the federal Internal Revenue Code, provided that such fee is charged for and applied to expenses incurred in the administration of ongoing community program services or rights provided to shared equity property interests within, as applicable, the land subject to the community land trust or the geographic area served by the community development corporation; or

(6) A party to a purchase contract, option, real property listing agreement, or other agreement which obligates one party to the agreement to pay the other, as full or partial consideration for the agreement or for a waiver of rights under the agreement, an amount determined by the agreement if such amount constitutes a fee or commission paid to a licensed real estate broker for brokerage services rendered in connection with the transfer of the property for

which such fee or commission is paid. (Code 1981, § 44-14-15, enacted by Ga. L. 2013, p. 634, § 3/HB 160.)

Effective date. — This Code section became effective July 1, 2013. See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 634, § 4/HB 160, not codified by the General Assembly, provides, in part, that this Code section shall apply to covenants recorded on or after July 1, 2013.

Law reviews. — For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

ARTICLE 2

MORTGAGES

JUDICIAL DECISIONS

Buyer unable to obtain mortgage. — In a potential home purchaser's action to recover earnest money, the seller was entitled to a directed verdict under O.C.G.A. § 9-11-50(a) on the basis that the contract was unenforceable because the contract did not list the loan amount or the interest rate on the loan; however, because the contract was unenforceable, the purchaser was not estopped from recovering the earnest money when the purchaser was unable to qualify for the mortgage. Parks v. Thompson Builders, Inc., 296 Ga. App. 704, 675 S.E.2d 583 (2009).

Failure to properly attest security deed failed to provide notice of security interest. — Security deed in favor of a bank was not attested by an unofficial witness as required by Georgia law and was patently defective and, thus, the deed did not provide constructive or actual notice of any security interest. As an unattested security deed was equivalent to an unrecorded deed under Georgia law, a Chapter 7 trustee, in the trustee's position as a hypothetical bona fide purchaser of real estate, had the power to avoid the transfer of the improperly attested deed, and the avoided lien was preserved for the benefit of the estate. Flatau v. Ga. Bank & Trust Co. of Augusta (In re Davis), No. 14-3033, 2014 Bankr. LEXIS 4588 (Bankr. M.D. Ga. Oct. 29, 2014).

44-14-30. Mortgage as security only; effect on title.

JUDICIAL DECISIONS

Cited in Bayview Loan Servicing, LLC v. Baxter, 312 Ga. App. 826, 720 S.E.2d 292 (2011); Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

44-14-31. Form and contents of mortgage.

JUDICIAL DECISIONS

ANALYSIS

PARTICULAR INSTRUMENTS

Particular Instruments

Trust indenture. — Language in a trust indenture stating that the debtor "pledged and assigned" the debtor's interest in real property to a bond trustee as security for payment of bonds was sufficient under Georgia law to create a lien, and the indenture granted the bond trustee a mortgage under Georgia law even though it was not in recordable form since it specified the debt owed, accurately described the real property, and evidenced a clear intent to create a lien on the real property. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

44-14-33. Attestation or acknowledgment of mortgage; additional witness in case of land; constructive notice.

In order to admit a mortgage to record, it shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. In the absence of fraud, if a mortgage is duly signed, witnessed, filed, recorded, and indexed on the appropriate county land records, such recordation shall be deemed constructive notice to subsequent bona fide purchasers. (Orig. Code 1863, § 1957; Code 1868, § 1945; Code 1873, § 1955; Ga. L. 1876, p. 34, § 1; Code 1882, § 1955; Civil Code 1895, § 2724; Civil Code 1910, § 3257; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-105; Ga. L. 1995, p. 1076, § 1; Ga. L. 2015, p. hb0322, § 3/HB 322.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of the first sentence for the former first sentence, which read: "In order to admit a mortgage to record, it must be attested by or acknowledged before an officer as prescribed for the attestation or acknowledgment of deeds of bargain and sale; and, in the case of real property, a mortgage must also be attested or acknowledged by one additional witness." and inserted "signed, witnessed," near the beginning of the second sentence.

Law reviews. — For annual survey on real property, see 65 Mercer L. Rev. 233 (2013). For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Attestation. — Attestation is not the act of subscribing one's name as a witness to the fact that a given paper was executed, but is instead the act of subscribing one's name as a witness to the fact that one witnessed the execution of a paper. Thus, the language of the affidavit did not make it clear that the closing attorney attested to execution of the Security Deed by the debtor or the debtor's ex-husband. Gordon v. Wells Fargo Bank, N.A. (In re Knight), 504 B.R. 668 (Bankr. N.D. Ga. 2014).

Effect of unattested mortgage.

Security deed to real property that lacked the signature of a witness did not provide constructive notice of the lender's lien against the property since O.C.G.A. § 44-14-33 provided for constructive notice only if the deed was duly recorded, and a duly recorded security deed was one that was attested by the requisite number of witnesses. Gordon v. Wells Fargo Bank, N.A. (In re Codrington), 430 B.R. 287 (Bankr. N.D. Ga. 2009).

Chapter 7 trustee put the material fact of the form of a security deed at the time of recordation in dispute, thus precluding summary judgment in favor of the lender on the trustee's complaint to avoid the lender's security deed under the trustee's strong arm powers by submitting a certi-

fied copy of the deed on file with a state court that did not include a notary stamp or seal as required under Georgia law when the official witness was a notary. Rainwater v. Chase Home Finance, LLC (In re Rainwater), No. 09-6711, 2013 Bankr. LEXIS 4294 (Bankr. N.D. Ga. Sept. 18, 2013).

Memorandum of trust indenture could not provide constructive notice of the existence of a mortgage and could not give rise to inquiry notice since the debtor did not sign the memorandum, the memorandum did not fall into any of the recognized categories of documents that could be recorded under the Georgia Code, and the memorandum was not properly attested. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Provisions of rider incorporated by reference. — Although the provisions of a rider or attached document may be incorporated into a security deed, the signatures attesting to execution of the rider or attached document do not suffice as an attestation of the security deed itself unless the language clearly states as such. Gordon v. Wells Fargo Bank, N.A. (In re Knight), 504 B.R. 668 (Bankr. N.D. Ga. 2014).

Attestation incorporated by reference. — Chapter 7 trustee could avoid, pursuant to 11 U.S.C. § 544(a), a security deed for real property that did not contain an attestation because the deed, which incorporated the terms of another document by reference, did not also incorporate the attestations to that document and did not meet the requirements for constructive notice under O.C.G.A. § 44-14-33. Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), No. 06-66024-CRM, 2007 Bankr. LEXIS 4398 (Bankr. N.D. Ga. Nov. 28, 2007).

Questions were certified to the Georgia Supreme Court as to whether proper attestation of a rider whose provisions were incorporated into a security deed could satisfy the requirements of O.C.G.A. § 44-14-33 for the deed itself or could create inquiry notice, such that a bankruptcy trustee could not avoid the deed under 11 U.S.C. § 544(a)(3). Wells Fargo Bank, N.A. v. Gordon (In re Codrington), 691 F.3d 1336 (11th Cir. 2012).

Attestation of security deed. — First sentence of O.C.G.A. § 44-14-33 and the statutory recording scheme indicate that the word "duly" in the second sentence of § 44-14-33 should be understood to mean that a security deed is "duly filed, recorded, and indexed" only if the clerk responsible for recording determines, from the face of the document, that it is in the proper form for recording, meaning that it is attested or acknowledged by a proper officer and (in the case of real property) an additional witness; the General Assembly chose to enact the 1995 amendment to O.C.G.A. § 44-14-33 not as a freestanding Code provision but as an addition to a Code provision clearly referenced by O.C.G.A. § 44-14-61, and the General Assembly is presumed to have been aware of the existing state of the law when the legislature enacted the 1995 amendment so the placement of the amendment makes complete sense. United States Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 709 S.E.2d 258 (2011).

Because an eight-paged security deed lacked the signature of an unofficial witness, the deed was not in recordable form as required by O.C.G.A. § 44-14-33 and did not provide constructive notice, therefore, the security deed was avoidable under 11 U.S.C. § 544 with regard to a debtor's bankruptcy. Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368 (2013).

Bankruptcy trustee was entitled to avoid a security deed, pursuant to 11 U.S.C. § 544, because the security deed was not duly recorded as the security deed did not appear to have two signatures and, therefore, did not appear to comply with all statutory requirements under O.C.G.A. §§ 44-2-15 and 44-14-33. Gordon v. Ameritrust Mortg. Co. LLC (In re Nesbitt), No. 11-5251, 2013 Bankr. LEXIS 3979 (Bankr. N.D. Ga. Sept. 13, 2013).

Trustee was entitled to avoid a creditor's security interest under the strong arm powers because it was not validly perfected under Georgia law; a security deed did not contain the requisite signature of an unofficial witness. One affidavit failed to meet the incorporation requirement set out in security deed, and an attorney's affidavits did not properly show

that the attorney witnessed a debtor's execution of the security deed; rather, they were merely an affirmation that the attorney's explanations preceded the debtor's execution. Gordon v. OneWest Bank FSB, (In re Blackmon), 509 B.R. 415 (Bankr. N.D. Ga. 2014).

Affidavit accompanying deed constituted substantial compliance. — Even assuming that a creditor's security deed was defective under O.C.G.A. § 44-14-33 by its lack of a notary seal, an affidavit accompanying the deed constituted substantial compliance with the remedial provisions of O.C.G.A. § 44-2-18, curing the alleged defect, and a bankruptcy trustee thus could not avoid the lien under 11 U.S.C. § 544(a). Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), 571 F.3d 1342 (11th Cir. 2009).

No signature of unofficial witness. — Security deed did not contain the requisite signature of an unofficial witness. The defect in the deed was patent and, under Georgia law, the deed did not provide constructive notice to a bona fide purchaser, and thus, the trustee was entitled to avoid the security deed pursuant to 11 U.S.C. § 544. Gordon v. Wells Fargo Bank, N.A. (In re Knight), 504 B.R. 668 (Bankr. N.D. Ga. 2014).

Default judgment when security deeds lacked signatures. — Facts in a trustee's complaint were sufficient to support the entry of default judgment against a bank as the subject security deeds lacked the requisite signatures to constitute constructive notice under O.C.G.A. 44-14-33; thus, the deeds were unenforceable against a subsequent bona fide purchaser. Gordon v. Wells Fargo Bank, N.A. (In re Lawton), No. 13-05261, 2014 Bankr. LEXIS 1179 (Bankr. N.D. Ga. Feb. 16, 2014).

44-14-34. Signing of mortgages executed outside state.

When executed outside this state, mortgages shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. (Ga. L. 1931, p. 153, § 1; Code 1933, § 67-106; Ga. L. 2015, p. 937, § 4/HB 322.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "When executed outside this state, mortgages may be attested, acknowledged, or probated in the same manner as deeds of bargain and sale."

44-14-37. Effect of failure to record.

Reserved. Repealed by Ga. L. 2015, p. 937, § 5/HB 322, effective July 1, 2015.

Editor's notes. — This Code section was based on Laws 1827, Cobb's 1851 Digest, p. 172; Code 1863, § 1959; Code 1868, § 1947; Code 1873, § 1957; Code 1882, § 1957; Civil Code 1895, § 2727; Civil Code 1910, § 3260; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-109.

44-14-38. Admission of mortgages into evidence.

Reserved. Repealed by Ga. L. 2011, p. 99, § 84/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Orig. Code 1863, § 1960; Code 1868, § 1948; Code 1873, § 1958; Code 1882, § 1958; Civil Code 1895, § 2782; Civil Code 1910, § 3261; Code 1933, § 67-110.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

44-14-39. Effect of defective record as notice.

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Not constructive notice.

Memorandum of trust indenture could not provide constructive notice of the existence of a mortgage and could not give rise to inquiry notice since the debtor did not sign the memorandum, the memorandum did not fall into any of the recognized categories of documents that could be recorded under the Georgia Code, and the memorandum was not properly attested. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Evidence did not demand a finding of actual notice. — After a jury entered a special verdict finding that the corporation had notice of an earlier deed securing property in the corporation's declaratory judgment action to determine the priority of its deed over the earlier deed, the corporation's motion for a new trial was properly granted on the ground that the recordation of the earlier deed was so defective as to provide no notice under O.C.G.A. § 44-14-39; the trial court did not abuse its discretion in granting a new trial, even though its grant of judgment notwithstanding the verdict was improper on the ground that evidence supported the jury's verdict, because the evidence, construed in the corporation's favor as required under O.C.G.A. § 5-5-20, did not absolutely demand a verdict that the corporation had actual notice of the earlier deed. Page v. McKnight Constr., 282 Ga. App. 571, 639 S.E.2d 381 (2006).

Cited in Sullivan v. Sullivan, 286 Ga. 53, 684 S.E.2d 861 (2009).

44-14-42.1. Redemption of property by mortgagor.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18 Am. Jur. Pleading and Practice Forms, Mortgages, § 250.

ARTICLE 3
CONVEYANCES TO SECURE DEBT AND BILLS OF SALE

PART 1
IN GENERAL

44-14-60. Deed to secure debt as absolute deed; necessity of bond of title or to reconvey.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FORM AND REQUISITES
DETERMINING NATURE OF INSTRUMENT
PRIORITIES
TRANSFER OR ASSIGNMENT
FORECLOSURE

General Consideration

Effect of execution of deed to nominee of lender. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as the lender's nominee, to secure the debt, the Chapter 7 trustee could not avoid the deed because the note and deed were executed together and remained linked via language in the documents that contemplated the agency relationship formed by the designation of the grantee as nominee. Drake v. Citizens Bank (In re Corley), 447 B.R. 375 (Bankr. S.D. Ga. 2011).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Form and Requisites

Statutory obligation to cancel satisfied notes. — The trial court, having found a debt to have been forgiven upon a decedent's death, did not err in ordering the decedent's administrator to cancel a deed to secure debt. The litigation did not give notice to the public that the deed had been cancelled; under O.C.G.A. §§ 44-14-3(b) and 44-14-60, a grantee of a security deed had the duty to cancel the deed of record when the obligation was satisfied. Mize v. Woodall, 291 Ga. App. 349, 662 S.E.2d 178 (2008).

Determining Nature of Instrument

Reversion of title.

Because a security deed did not specify a fixed period for repayment or state that the security interest was perpetual under O.C.G.A. § 44-14-80(a), title to the property reverted to the grantor after seven years and the grantee's security interest in the property was lost. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

Priorities

No judgment lien shown. — Trial court erred by granting summary judgment to a judgment lienholder because the lienholder did not establish as a matter of law that the lienholder had any legal or equitable interest in the property at any time after a quitclaim deed was

executed; because the record did not establish that the lienholder had any ownership interest in the property upon which the right to seize assets could attach, the trial court erred in finding that the lienholder held a judgment lien against the property. Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC, 325 Ga. App. 662, 754 S.E.2d 630 (2014).

Transfer or Assignment

Bad faith acted to lift automatic stay of bankruptcy. — Because a debtor filed a second bankruptcy petition for the express purpose of delaying and frustrating the legitimate efforts of a secured creditor to enforce its right of foreclosure, the debtor was found to have not acted in good faith under 11 U.S.C. § 362(g); thus, cause existed to annul or lift the automatic stay pursuant to 11 U.S.C. § 362(d). GRP Fin. Servs. Corp. v. Olsen (In re Olsen), No. 06-66198-MGD, 2007 Bankr. LEXIS 614 (Bankr. N.D. Ga. Jan. 8, 2007).

Foreclosure

Claims not barred as improper deficiency actions. — Trial court erred in ruling that a bank's claims against borrowers and guarantors for breach of promissory notes were barred as improper deficiency actions under O.C.G.A. § 44-14-161(a) due to the bank's failure to seek confirmation after the foreclosure auctions because although the bank conducted and bid at foreclosure auctions of the real property that secured the notes, the transfer of a borrower's right of possession and the borrower's equity of redemption to the bank as the foreclosure sale purchaser never occurred; three days after the foreclosure auctions, the bank notified the borrowers that the bank rescinded any actions taken with respect to foreclosure and that the foreclosures were not and would not be consummated, and by definition, the confirmation procedure had no application when there had been no foreclosure sale. Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 310 Ga. App. 466, 713 S.E.2d 670 (2011), aff'd in part, rev'd in part, 290 Ga. 724, 723 S.E.2d 674; vacated in part, 316 Ga. App. 496, 729 S.E.2d 612 (2012).

44-14-61. Signing of deeds to secure debt and bills of sale — Generally.

In order to admit deeds to secure debt or bills of sale to secure debt to record, they shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. (Ga. L. 1884-85, p. 124, § 2; Civil Code 1895, § 2773; Civil Code 1910, § 3308; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1302; Ga. L. 2015, p. 937, § 6/HB 322.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "In order to admit deeds to secure debt or bills of sale to record, they shall be attested or proved in the manner prescribed by law for mortgages.".

JUDICIAL DECISIONS

Unwitnessed paper.

Because no unofficial witness attested to or acknowledged a security deed when debtor signed it, despite the recordation of the deed and a subsequent recordation of a scrivener's affidavit attesting that the affiant, an attorney, was an unofficial witness to the signing of the deed, under Georgia law, specifically, O.C.G.A. § 44-14-61, the deed was unperfected; subsequent assignments of the security deed to a bank and then to the creditor were not equivalent to a perfected second security deed that acknowledged the first

and, thus, did not cure the patent defect in the deed. Wash. Mut. Home Loans v. Yearwood (In re Yearwood), 318 B.R. 227 (Bankr. M.D. Ga. 2004).

Failure to properly attest security deed failed to provide notice of security interest. — Security deed in favor of a bank was not attested by an unofficial witness as required by Georgia law and was patently defective and, thus, the security deed did not provide constructive or actual notice of any security interest. As an unattested security deed was equivalent to an unrecorded deed under Georgia law, a Chapter 7 trustee, in the trustee's position as a hypothetical bona fide purchaser of real estate, had the power to avoid the transfer of the improperly attested deed, and the avoided lien was preserved for the benefit of the estate. Flatau v. Ga. Bank & Trust Co. of Augusta (In re Davis), No. 14-3033, 2014 Bankr. LEXIS 4588 (Bankr. M.D. Ga. Oct. 29, 2014).

Attestation of security deed. — First sentence of O.C.G.A. § 44-14-33 and the statutory recording scheme indicate that the word "duly" in the second sentence of § 44-14-33 should be understood to mean that a security deed is "duly filed, recorded, and indexed" only if the clerk responsible for recording determines, from the face of the document, that it is in the proper form for recording, meaning that it is attested or acknowledged by a proper officer and (in the case of real property) an additional witness; the General Assembly chose to enact the 1995 amendment to O.C.G.A. § 44-14-33 not as a freestanding Code provision but as an addition to a Code provision clearly referenced by O.C.G.A. § 44-14-61, and the General Assembly is presumed to have been aware of the existing state of the law when the legislature enacted the 1995 amendment so the placement of the amendment makes complete sense. United States Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 709 S.E.2d 258 (2011).

Because an eight-paged security deed lacked the signature of an unofficial witness, the deed was not in recordable form as required by O.C.G.A. § 44-14-33 and did not provide constructive notice, therefore, the security deed was avoidable under 11 U.S.C. § 544 with regard to a debtor's bankruptcy. Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368 (2013).

Rescission had no legal effect. — While the rescission was signed by two witnesses and notarized in accordance with O.C.G.A. § 44-14-61, there was no evidence of the grantor conveying such an interest. Thus, the rescission had no legal effect. Mak v. Argent Mortg. Co., LLC, No. 1:07-cv-02806-JOF, 2009 U.S. Dist. LEXIS 84746 (N.D. Ga. Sept. 15, 2009).

Cited in Gordon v. Ameritrust Mortg. Co. LLC (In re Nesbitt), No. 11-5251, 2013 Bankr. LEXIS 3979 (Bankr. N.D. Ga. Sept. 13, 2013).

44-14-62. Signing of deeds to secure debt and bills of sale — Out-of-state deeds to secure debt and bills of sale.

When executed outside this state, deeds to secure debt and bills of sale to secure debt shall be signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. (Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1303; Ga. L. 2015, p. 937, § 7/HB 322.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "When executed out of state, deeds to secure debt and bills of sale may be attested, acknowledged, or probated in the same manner as deeds of bargain and sale.".

JUDICIAL DECISIONS

Vesting holder of security interest with title by filing. — When the plaintiff, a Georgia citizen, filed a wrongful foreclosure action against, among others, a non-diverse defendant, the removing defendant met the defendant's burden of showing that there was no possibility that the plaintiff could establish a cause of action against the non-diverse defendant because, although it arguably could be held liable for a violation of Georgia foreclosure statutes as a result of acting as foreclosure counsel for the lender, the lender, through the lender's merger predecessor, appeared in the public record before the foreclosure sale. Jackson v. Bank of Am., NA, No. 13-15791, 2014 U.S. App. LEXIS 16196 (11th Cir. Aug. 22, 2014) (Unpublished).

44-14-63. Recording of deeds to secure debt and bills of sale to secure debt; effect of failure to record.

(a) Every deed to secure debt shall be recorded in the county where the land conveyed is located. Every bill of sale to secure debt shall be recorded in the county where the maker, if a resident of this state, resided at the time of its execution and, if a nonresident, in the county where the personalty conveyed is located. Deeds to secure debt or bills of sale to secure debt not recorded shall remain valid against the persons executing them.

(b) A deed to secure debt shall not be recorded unless it includes the mailing address of the grantee thereof. Failure to comply with this provision shall not be a defense to any foreclosure or grounds to set aside any foreclosure of any deed to secure debt. (Ga. L. 1884-85, p. 124, § 1; Civil Code 1895, § 2772; Civil Code 1910, § 3307; Ga. L. 1931, p. 153, § 1; Code 1933, § 67-1305; Ga. L. 1989, p. 859, § 1; Ga. L. 2015, p. 937, § 8/HB 322.)

The 2015 amendment, effective July 1, 2015, in subsection (a), inserted "to secure debt" twice in the last sentence and deleted the former last sentence, which read: "The effect of the failure to record deeds and bills of sale shall be the same as the effect of the failure to record a deed of bargain and sale.".

JUDICIAL DECISIONS

ANALYSIS

RECORDING
EFFECT OF FAILURE TO RECORD

Recording

Recording in wrong place equivalent to no record.

Chapter 7 trustee was allowed under 11 U.S.C. § 544 and O.C.G.A. § 44-14-63(a) to avoid a security deed which debtors gave to a bank before the debtors declared Chapter 7 bankruptcy because the bank filed the deed in the wrong county. There was no merit to the bank's claim that the trustee had inquiry notice of the bank's security interest because the debtors used the proceeds of a loan the debtors obtained from the bank to pay a debt to another bank and the other filed documents to cancel its loan that were defective under

Recording (Cont'd)

O.C.G.A. § 44-14-67(c); in addition, the doctrine of equitable subordination did not prevent the trustee from avoiding the bank's secured interest. Rogers v. M&I Bank FSB (In re Morgan), 449 B.R. 821 (Bankr. N.D. Ga. 2010).

Preference arose when security executing not recorded. — Elements of a preference under 11 U.S.C. § 547(b) were met since the mortgagee's claim based on the mortgagee's security deed arose when the security deed was executed, under O.C.G.A. 44-14-63, but the transfer occurred when the security deed was recorded, and thus was made on behalf of antecedent debt. Ogier v. Mortg. Elec. Registration Sys. (In re Tanoh), No. 09-6017, 2011 Bankr. LEXIS 3760 (Bankr. N.D. Ga. Sept. 26, 2011).

Effect of Failure to Record

Recording of security deed not necessary to effect a transfer between debtors and lender. — Because the security deed between the debtors and the lender was effective as between those parties at execution, it was not relevant that the security deed was recorded within 90 days prior to the debtors filing a petition in bankruptcy; under the doctrine of equitable subrogation, the security deed was not avoidable as a preferential transfer. Gordon v. NovaStar Mortg., Inc. (In re Hedrick), No. 04-92733-JEM, 2005 Bankr. LEXIS 1923 (Bankr. N.D. Ga. Aug. 31, 2005), aff'd, 524 F.3d 1175 (11th Cir. 2008); modified and reh'g denied, 529 F.3d 1026 (11th Cir. 2008).

No judgment lien shown. — Trial court erred by granting summary judgment to a judgment lienholder because the lienholder did not establish as a matter of law that the lienholder had any legal or equitable interest in the property at any time after a quitclaim deed was executed; because the record did not establish that the lienholder had any ownership interest in the property upon which the right to seize assets could attach, the trial court erred in finding that the lienholder held a judgment lien against the property. Wells Fargo Bank, N.A. v. Twenty Six Properties, LLC, 325 Ga. App. 662, 754 S.E.2d 630 (2014).

44-14-64. Transfers of deeds to secure debt; execution; partial transfers; transfers by certain financial institutions; requirements for recording; payoff balance.

JUDICIAL DECISIONS

Effect of transfer of deed to nominee of lender. — After Chapter 7 debtor executed a note to a lender and also executed a security deed to a grantee, as the lender's nominee, to secure the debt, there was no separation of the note and security deed as a matter of law resulting from the transfer of the security deed. Drake v. Citizens Bank (In re Corley), 447 B.R. 375 (Bankr. S.D. Ga. 2011).

Bad faith acted to lift automatic stay of bankruptcy. — Because a debtor filed a second bankruptcy petition for the express purpose of delaying and frustrating the legitimate efforts of a secured creditor to enforce its right of foreclosure, the debtor was found to have not acted in good faith under 11 U.S.C. § 362(g); thus, cause existed to annul or lift the automatic stay pursuant to 11 U.S.C. § 362(d). GRP Fin. Servs. Corp. v. Olsen (In re Olsen), No. 06-66198-MGD, 2007 Bankr. LEXIS 614 (Bankr. N.D. Ga. Jan. 8, 2007).

Effect of transfer of deed from nominee to lender. — Foreclosure sale was valid because there was no defect in the assignment of the power of sale from the nominee to the lender when the security deed did not lack any essential terms regarding the nominee's role, rights, or duties under O.C.G.A. § 10-6-1 and no consideration was needed under O.C.G.A. § 44-14-64(a). The lender did not violate the automatic stay of 11 U.S.C. § 362(a) by recording the sale post-petition because the Chapter 13 debtor retained no interest in the property after the sale. Bishop v. GMAC Mortg., LLC (In re

Bishop), 470 B.R. 633 (Bankr. M.D. Ga. 2011).

Assignment of security deed. — Under O.C.G.A. §§ 23-2-114 and 44-14-64(b), the assignments of plaintiff homeowner's security deed granted to defendant bank did not diminish the deed's powers in the bank's foreclosure action, thus, the homeowner's wrongful foreclosure claim failed to state a claim for relief. Milani v. OneWest Bank FSB, No. 11-15378, 2012 U.S. App. LEXIS 21559 (11th Cir. Oct. 17, 2012) (Unpublished).

District court properly dismissed the plaintiff's suit against multiple financial institutions and fictitious parties seeking declaratory and equitable relief to stop foreclosure proceedings as there was no dispute that the holder of the security deed at the time of the proposed foreclosure had the authority to foreclose on the property in accordance with the security deed's power of sale. Assignment of the security deed did not diminish the instrument's powers under Georgia law. Stabb v. GMAC Mortg., LLC, No. 13-15900, 2014 U.S. App. LEXIS 16081 (11th Cir. Aug. 21, 2014) (Unpublished).

44-14-65. Fees for transfer of real property covered by deed to secure debt.

Reserved. Repealed by Ga. L. 1984, p. 132, § 1, effective February 3, 1984.

Editor's notes. — Ga. L. 2015, p. 5, § 7/HB 90, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, reserved the designation of this Code section.

44-14-66. Effect of liens against grantee on grantor's right to reconvey; effect of reconveyance in event of grantor's prior death.

JUDICIAL DECISIONS

Legal title automatically reverted. — Trial court did not err in holding that children acquired a collective two-thirds interest in property because pursuant to O.C.G.A. § 44-14-67(a), when the original security deeds were paid off and cancelled legal title automatically reverted to the father and the children, his assigns; the father had no authority thereafter to convey a greater interest than he held and, thus, only the father's own one-third interest could be encumbered by the loan that was made to the father without any involvement by the children. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Cited in Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

44-14-67. Cancellation of deed as reconveyance of title.

JUDICIAL DECISIONS

Legal title automatically reverted. — Trial court did not err in holding that children acquired a collective two-thirds interest in property because pursuant to O.C.G.A. § 44-14-67(a), when the original security deeds were paid off and cancelled legal title automatically reverted to the father and the children, his assigns; the father had no authority thereafter to convey a greater interest than he held, and thus, only the father's own one-third interest could be encumbered by the loan that was made to the father without any involvement by the children. Chase Man-

hattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Sufficiency of deed cancellation. — Chapter 7 trustee was allowed under 11 U.S.C. § 544 and O.C.G.A. § 44-14-63(a) to avoid a security deed which debtors gave to a bank before the debtors declared Chapter 7 bankruptcy because the bank filed the deed in the wrong county. There was no merit to the bank's claim that the trustee had inquiry notice of the bank's security interest because the debtors used the proceeds of a loan the debtors obtained from the bank to pay a debt to another bank and the other filed documents to cancel the bank's loan that were defective under O.C.G.A. § 44-14-67(c); in addition, the doctrine of equitable subordination did not prevent the trustee from avoiding the bank's secured interest. Rogers v. M&I Bank FSB (In re Morgan), 449 B.R. 821 (Bankr. N.D. Ga. 2010).

Erroneous cancellation of security deed. — Trial court did not err in reinstating the security deed after the bank erroneously cancelled the security deed as the recorded cancellation did not reconvey title since the debt was not fully satisfied and, thus, the bank retained the bank's right to non-judicial foreclosure. Patel v. J.P. Morgan Chase Bank, N.A., 327 Ga. App. 321, 757 S.E.2d 460 (2014).

No reconveyance where secured debt not paid in full. — Because the debt to the bank was not paid, the title of the property could not have been reconveyed to the successor of the grantor of the bank's security interest pursuant to O.C.G.A. § 44-14-67(a). Therefore, the bank's security interest was never reconveyed and the bank held a senior position based on the bank's 1997 mortgage to the grantor. Mak v. Argent Mortg. Co., LLC, No. 1:07-cv-02806-JOF, 2009 U.S. Dist. LEXIS 84746 (N.D. Ga. Sept. 15, 2009).

In a case in which (1) a creditor's security interest was inadvertently released before the mortgage on the debtor's residence was paid in full; (2) the debtor sought declaratory relief as to secured status, to avoid preferential transfer, and for monetary damages for wrongful foreclosure; and (3) the creditor moved for summary judgment, the creditor's inadvertent filing of a rescission of cancellation of the creditor's security interest in the debtor's residence did not result in a transfer of an interest of the debtor in the property. Under O.C.G.A. § 44-14-67(a), filing a notice of cancellation did not terminate the creditor's lien; the satisfaction of the debt did so. In re Poff, No. 09-05052, 2010 Bankr. LEXIS 4703 (Bankr. M.D. Ga. Dec. 16, 2010).

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010).

Failure to provide a separate statement swearing to fate of original document. — According to In re Morgan, 449 B.R. 821 (Bankr.N.D.Ga. 2010), the failure to provide a separate statement swearing to the fate of the original document does not, by itself, put a hypothetical bona fide purchaser on inquiry notice because "given the plain language of the statute, the presentation of an instrument of cancellation conforming to this form with an attested, witnessed signature in and of itself evidences a sworn statement that the original security deed to be cancelled is unavailable." Though the Morgan decision did not address ownership, the reasoning plainly extends to it; the statute (in the context of O.C.G.A. § 44-14-67(c)), provides a form, so that the form clearly complies with the requirements of the statute. Gordon v. Wells Fargo Bank, N.A. (In re Ingram), No. 08-6440, 2013 Bankr. LEXIS 2614 (Bankr. N.D. Ga. Apr. 5, 2013).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a

bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Part 2

Reversion

44-14-80. Reversion of realty to grantor; renewals and affidavits; effect; fees; construction of Code section.

Law reviews. — For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).

JUDICIAL DECISIONS

What constitutes "affirmative statement." — Use of the words "forever, in fee simple" in a security deed were not an "affirmative statement" within the meaning of O.C.G.A. § 44-14-80(a)(2) such that title to the property did not revert to the grantor for 20 years, rather than seven years, because those words related to the estate granted rather than the duration of the security interest. Parol evidence was not admissible and § 44-14-80 controlled over O.C.G.A. § 44-6-21. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

Notice requirements in security deed. — Issue of whether a grantee properly served notice to cure to a promisor 60 days prior to initiating foreclosure proceedings, as stipulated in the grantee's security deed, was not waived because once the foreclosure sale the grantee conducted was completed, a bank properly amended the bank's petition to include the issue of whether the foreclosure sale was validly conducted; the pre-trial order in the case specifically listed as substantive issues whether the foreclosure sale was validly conducted and, if not, whether title under the grantee's security deed reverted to the promisor pursuant to O.C.G.A. § 44-14-80(a)(1), and the 60-day notice issue directly related to whether the foreclosure sale was validly conducted because the grantee was legally required to advertise and sell the property according to the terms of the security deed. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Special master, in accordance with the special master's complete jurisdiction under O.C.G.A. § 23-3-66, was entitled to review the pleadings and evidence to determine the valid interests in real property because an amended pleading properly filed by a bank included claims that a grantee's foreclosure sale was improper and that title under the grantee's security deed reverted to a promisor pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Incorporation by reference. — Presence in a deed to secure debt of a date that was referenced in a note as the maturity date of the loan, and the incorporation by reference of the note into the deed sufficed to fulfill the requirements of O.C.G.A. § 44-14-80(a)(1) that the maturity date of a debt be stated in the record of the conveyance; there is no reason that the terms of a note cannot be incorporated by reference into a deed. United Bank v. West Cent. Ga. Bank, 275 Ga. App. 418, 620 S.E.2d 654 (2005).

Estoppel. — Bank was not estopped from asserting that title to real property reverted to a promisor under a grantee's security deed because an investment company had constructive and actual knowledge of the bank's assertion of superior

title and the possibility that title to the property pursuant to the grantee's security deed had reverted, and there was no evidence that the company relied in any way upon the bank's actions, silence, or inactions; the bank filed suit claiming superior title to the property and recorded a notice of lis pendens well in advance of the foreclosure sale, the company, which purchased the property, admitted at the hearing before the special master that the company knew of the suit against the property but decided to purchase the property anyway, and the company also admitted at that hearing that since the grantee's security deed was public record, the company had notice of both the maturity date on the security deed and the date on which automatic reversion could occur pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

44-14-83. Actions to foreclose and exercise of powers of sale after reversion.

JUDICIAL DECISIONS

Title reverted to grantor after seven years causing grantee to lose security interest. — Because a security deed did not specify a fixed period for repayment or state that the security interest was perpetual under O.C.G.A. § 44-14-80(a), title to the property reverted to the grantor after seven years and the grantee's security interest in the property was lost. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

ARTICLE 7

FORECLOSURE

Law reviews. — For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

Part 1

In General

Law reviews. — For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Sufficiency of Manner and Timeliness of Redemption of Real Estate Contract from Foreclosure, 66 POF3d 267.

44-14-160. Filing of foreclosure and deed under power; penalty for late payment.

(a) Within 90 days of a foreclosure sale, all deeds under power shall be filed by the holder of a deed to secure debt or a mortgage with the clerk of the superior court of the county or counties in which the foreclosed property is located. The clerk shall record and cross reference the deed under power to the deed to secure debt or mortgage foreclosed

upon. The deed under power shall be indexed pursuant to standards promulgated by the Georgia Superior Court Clerks' Cooperative Authority.

(b) In the event the deed under power is not filed within 30 days after the time period set forth in subsection (a) of this Code section, the holder shall be required to pay a late filing penalty of $500.00 upon filing in addition to the required filing fees provided for in subsection (f) of Code Section 15-66-77. Such late filing penalty shall be collected by the clerk of the superior court before filing.

(c) The sums collected as a late filing penalty under subsection (b) of this Code section shall be remitted to the governing authority of the county. If the foreclosed property is located within a municipality, the governing authority of the county shall remit the late filing penalty for such property to the governing authority of such municipality within 30 days of its receipt of the penalty. For each late filing penalty for property located within the corporate limits of a municipality, the governing authority of the county may withhold a 5 percent administrative processing fee from the remittance to such municipality. (Ga. L. 1975, p. 422, § 1; Ga. L. 2009, p. 614, § 1/SB 141; Ga. L. 2015, p. 937, § 9/HB 322.)

The 2009 amendment, effective July 1, 2009, substituted the present first sentence for "When the holder of a deed to secure debt or a mortgage forecloses the same and sells the real property thereby secured under the laws of this state governing foreclosures and sales under power and the purchaser thereof presents to the clerk of the superior court his deed under power to have the same recorded, the" and added "The" at the beginning of the second sentence.

The 2015 amendment, effective July 1, 2015, designated the existing provisions as subsection (a); in subsection (a), substituted "filed" for "recorded" in the middle of the first sentence, and, in the second sentence, substituted "record and cross reference the deed under power to" for "write in the margin of the page where" and deleted "is recorded the word 'foreclosed' and the deed book and page number on which is recorded the deed under power conveying the real property; provided, however, that, in counties where the clerk keeps the records affecting real estate on microfilm, the notation provided for in this Code section shall be made in the same manner in the index or other place where the clerk records transfers and cancellations of deeds to secure debt" following "foreclosed upon", and added the last sentence; and added subsections (b) and (c).

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Property not sold. — Under Georgia law, the homeowner had to first show that the homeowner's property was sold at a foreclosure in order to state a plausible claim for wrongful disclosure; because the homeowner did not allege that a foreclosure sale occurred, the homeowner failed to state such a claim. Thomas v. Bank of Am., N.A., 2014 U.S. App. LEXIS 3162 (11th Cir. Feb. 21, 2014) (Unpublished).

Summary judgment proper once security deed paid in full. — In an action

to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Failure to timely file deed. — Failure to timely file a deed following a foreclosure sale under O.C.G.A. § 44-14-160 was not fatal to the confirmation of the sale; confirmation was to pass upon the notice, advertisement, and regularity of the sale. To the extent that any claim was available to a debtor, the appropriate vehicle was a wrongful foreclosure action. Harper v. Ameris Bank, 326 Ga. App. 67, 755 S.E.2d 872 (2014).

44-14-161. Sales made on foreclosure under power of sale — When deficiency judgment allowed; confirmation and approval; notice and hearing; resale.

Law reviews. — For annual survey of real property law, see 56 Mercer L. Rev. 395 (2004). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For article, "Enforcing Commercial Real Estate Loan Guaranties," see 15 (No. 2) Ga. State Bar J. 12 (2009). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For article, "Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World: Back to the Future," see 16 (No. 4) Ga. St. B.J. 11 (2010). For annual survey on real property, see 66 Mercer L. Rev. 151 (2014).

For comment, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Comment: Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia," see 65 Mercer L. Rev. 1167 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Sales Made on Foreclosure Under Power of Sale
Confirmation and Approval of Sale
1. Nature of Proceeding
2. Application in Out-of-State and Federal Courts
4. Confirmation
5. True Market Value
Hearing
2. Issues
B. Notice to Debtor
C. Advertisement
3. Debtor's Rights
4. Evidence
5. Review
Resale
1. Discretion of Court
2. Good Cause

General Consideration

O.C.G.A. § 44-14-161 is not applicable, etc.

Creditor legally may seek, should a deficiency exist, to foreclose upon additional collateral, regardless of its compliance with O.C.G.A. § 44-14-161. A creditor does not, however, have an "unqualified right" to additional collateral when such collateral is under the exclusive, equitable jurisdiction of the bankruptcy court. Synovus Bank v. Brooks (In re Brooks), 479 B.R. 917 (Bankr. N.D. Ga. 2012).

Creditor not required to foreclose prior to seeking judgment on a note. — Trial court's decision granting summary judgment in favor of a creditor on the creditor's suit on a promissory note and guaranty executed by debtors was proper. The creditor was not required to foreclose on the property securing the note and obtain judicial confirmation under O.C.G.A. § 44-14-161(a) prior to seeking judgment on the note. Reese Developers, Inc. v. First State Bank, 306 Ga. App. 13, 701 S.E.2d 505 (2010).

O.C.G.A. § 44-14-161(a) did not bar a bank from first suing the guarantors on their guarantees and then, eleven months later, conducting a nonjudicial foreclosure sale of the collateral because, at the time the bank filed suit on the guarantees, the bank had no deficiency to recover because the bank had not conducted a nonjudicial sale of the property. State Bank of Tex. v. Patel, No. 11-11268, 2011 U.S. App. LEXIS 19958 (11th Cir. Sept. 30, 2011) (Unpublished).

Foreclosure sale properly conducted and consummated with bank as purchaser. — Foreclosure sales were properly conducted and consummated under O.C.G.A. § 44-14-161 because a bank purchased the secured properties at the sale after the debtor defaulted on promissory notes to the bank, the requisite procedures for the sale were followed, and the fact that the bank conveyed the debtor's interest to the bank's wholly-owned subsidiary under a separate agreement did not undercut the underlying sales. Peachtree Homes, Inc. v. Bank of America, N.A., 315 Ga. App. 243, 726 S.E.2d 737 (2012).

Property omitted from appraisal meant invalid foreclosure sale. — Good cause existed to believe that the property did not sell for true market value because the lender's bid at the foreclosure sale was based on an appraisal that did not include the entire land mass or full extent of the property at issue. Based on this clear omission in the appraisal, the trial court was authorized to find that the property did not sell for fair market value at the foreclosure sale. Ciuperca v. RES-GA Seven, LLC, 319 Ga. App. 61, 735 S.E.2d 107 (2012).

Cited in Fayette Promenade, LLC v. Branch Banking & Trust Co., 258 Ga. App. 323, 574 S.E.2d 319 (2002); Graham v. Casa Invs. Co., 274 Ga. App. 59, 616 S.E.2d 833 (2005).

Sales Made on Foreclosure Under Power of Sale

Claims not barred as improper deficiency actions. — Trial court erred in ruling that a bank's claims against borrowers and guarantors for breach of promissory notes were barred as improper deficiency actions under O.C.G.A. § 44-14-161(a) due to the bank's failure to seek confirmation after the foreclosure auctions because although the bank conducted and bid at foreclosure auctions of the real property that secured the notes, the transfer of a borrower's right of possession and the borrower's equity of redemption to the bank as the foreclosure sale purchaser never occurred; three days after the foreclosure auctions, the bank notified the borrowers that the bank rescinded any actions taken with respect to foreclosure and that the foreclosures were not and would not be consummated, and by definition, the confirmation procedure had no application when there had been no foreclosure sale. Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 310 Ga. App. 466, 713 S.E.2d 670 (2011), aff'd in part, rev'd in part, 290 Ga. 724, 723 S.E.2d 674; vacated in part, 316 Ga. App. 496, 729 S.E.2d 612 (2012).

Where there are separate debts, etc.

Trial court did not err by granting summary judgment to the lender in the lender's suit on a note because the mortgage loans were held by different entities when

Sales Made on Foreclosure Under Power of Sale (Cont'd)

the other lender foreclosed on the lender's first-priority security deed, thus, the loans were not inextricably intertwined and the deficiency could be collected by the lender. Hildebrand v. Bank of America, N.A., No. A14A1956, 2015 Ga. App. LEXIS 157 (Mar. 19, 2015).

Irregular sale due to title status not shown. — The trial court properly entered an order confirming the sale of real property foreclosed on by a bank, under a power of sale contained in a deed to secure debt given by a debtor, as that debtor failed to show that any rights under O.C.G.A. § 44-14-161 or O.C.G.A. § 9-11-58 were jeopardized, and a claim that the sale was irregular due to the status of the property's title on the date of the sale fell outside of the ambit of § 44-14-161. Friedman v. Regions Bank, 288 Ga. App. 57, 653 S.E.2d 507 (2007).

Confirmation and Approval of Sale

1. Nature of Proceeding

Confirmation proceeding not same as wrongful foreclosure suit. — Prior pending wrongful foreclosure action did not require the abatement and dismissal of a bank's application for confirmation under O.C.G.A. § 44-14-161 because the confirmation proceeding did not involve the same cause of action as the wrongful foreclosure suit, but was instead a special statutory proceeding and not a complaint which initiated a civil action or suit. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210 (2008).

Statute does not mandate separate evidentiary hearing for each property foreclosed. — Trial court did not abuse the court's discretion when the court consolidated the confirmation hearings on three foreclosure sales because O.C.G.A. § 44-14-161 did not mandate a separate evidentiary hearing for each property foreclosed. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889 (2010).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117 (2012).

2. Application in Out-of-State and Federal Courts

Statute cannot operate so as to deprive federal courts of jurisdiction, etc.

Trial court did not err in dismissing the bank's petition for confirmation of the foreclosure sale when, by filing the application with the court rather than the superior court judge, the bank failed to comply with the requirements of O.C.G.A. § 44-14-161(a). Citizens Bank of Effingham v. Rocky Mt. Enterps., LLC, 308 Ga. App. 600, 708 S.E.2d 557 (2011).

Proceeding is within contemplation of automatic stay provisions of bankruptcy law.

Automatic stay, as it applied to the commencement of actions or proceedings against the debtor, terminated when the court entered the court's order on February 17, 2011, granting the debtor a discharge in bankruptcy, 11 U.S.C. § 362(c)(2)(C); notice of the order of discharge was served on the bank on February 19, 2011. Thus, when the bank foreclosed the following July or August of 2011, there was no stay in place; accordingly, 11 U.S.C. § 108(c)(1) controlled and the tolling under § 108(c) ended when the time within which the confirmation had to be reported to the state superior court lapsed thirty days after the foreclosure. Mt. Valley Cmty. Bank v. Freeman (In re Freeman), No. 11-3019, 2012 Bankr. LEXIS 5887 (Bankr. M.D. Ga. Dec. 21, 2012).

Stay under federal law lifted to allow proceeding under statute. — Automatic stay was lifted under 11 U.S.C. § 362(d)(1) to permit a creditor to proceed with the confirmation of a foreclosure sale because, pursuant to O.C.G.A. § 44-14-161, the creditor could not pursue the creditor's deficiency claim unless the sale was confirmed by the superior court

within 30 days. In re McDaniel, No. 08-50021-JDW, 2008 Bankr. LEXIS 4227 (Bankr. M.D. Ga. May 5, 2008).

4. Confirmation

Sale must be advertised in every county where property located. — Trial court did not err in denying a mortgagee's application for confirmation of a nonjudicial foreclosure sale because the court properly ruled that the mortgagee's advertisement failed to comport with the statutory requirements of O.C.G.A. § 44-14-162(a); a sale of real property under a power of sale made pursuant to § 44-14-162(a) must be advertised in every county where the property or any portion of the property is located. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572 (2012).

Foreign limited liability company was not transacting business by petitioning for confirmation. — Trial court did not err by denying a mortgagor's motion to dismiss the foreclosure confirmation proceeding based on the mortgagee being a foreign limited liability company impermissibly transacting business in Georgia because a limited liability company was not considered to be transacting business in Georgia merely because it engaged in acquiring loan documents, conducting a foreclosure sale, purchasing the property at the sale, reporting the sale, and filing the confirmation petition. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014).

Sale properly confirmed. — Trial court did not err in confirming the November sale of certain real estate in a foreclosure action because the mortgagor failed to show that it was deprived of any protection afforded by O.C.G.A. § 44-16-161 as the confirmation proceeding commenced in connection with the November sale comprised a new action after the July sale was invalidated, all of the advertisement requirements were met, and the property was sold for its true market value. Howser Mill Homes, LLC v. Branch Banking & Trust Co., 318 Ga. App. 148, 733 S.E.2d 441 (2012).

Trial court did not err by confirming a foreclosure sale because issues as to whether the foreclosing bank recorded an assignment of the deed to secure debt before the foreclosure sale and the validity of the assignment were irrelevant to the confirmation proceeding. River Walk Farm, L.P. v. First Citizens Bank & Trust Co., 321 Ga. App. 173, 741 S.E.2d 165 (2013).

Trial court properly confirmed a foreclosure sale under O.C.G.A. § 44-14-161 because the borrower raised no issue to support reversal as the bank provided admissible testimony as to the advertisement, notice, and regularity of the actual sale, supporting documents, and no objection was made. Sugarloaf Plaza, LLC v. Touchmark National Bank, 319 Ga. App. 648, 738 S.E.2d 104 (2013).

Trial court properly confirmed the foreclosure of an apartment complex because, although the valuations of the property were not identical, there was no evidence that the property was worth more than the bank paid at auction. Ga. Ltd. Partners, LLC v. City Nat'l Bank, 323 Ga. App. 766, 748 S.E.2d 131 (2013).

The trial judge's confirmation, etc. Trial court did not abuse the court's discretion by ordering the resale of the property in a foreclosure confirmation proceeding because nothing in the record indicated that the trial court failed to exercise the court's discretion out of a belief that the bank was entitled to a resale merely because the bank had relied on a flawed appraisal; rather, the trial court found that the bank relied on a flawed appraisal in good faith and that the bank had shown good cause for a resale. Sanusi v. Cmty. & S. Bank, 330 Ga. App. 198, 766 S.E.2d 815 (2014).

Failure to obtain confirmation does not prevent enforcement against additional security. — Trial court did not err in granting summary judgment to a note holder on the holder's suit against a debtor as a personal guarantor of the note because the failure to confirm the nonjudicial foreclosure sale pursuant to the security deed did not prevent the holder from seeking to enforce the holder's contractual right to recover against additional security on the debt. HWA Props., Inc. v. Cmty. & S. Bank, 322 Ga. App. 877, 746 S.E.2d 609 (2013).

Confirmation and Approval of Sale (Cont'd)

4. Confirmation (Cont'd)

Because the record did not demonstrate that the promissory notes underlying a bank's claims were inextricably intertwined with any debt on six of the foreclosure sales, the trial court was not authorized to conclude that the bank's claims relating to those promissory notes were barred as impermissible attempts to obtain deficiency judgments. First Citizens Bank & Trust, Inc. v. Ruddell, 330 Ga. App. 82, 766 S.E.2d 538 (2014).

In a bank's appeal of summary judgments entered against the bank and in favor of various defendants, which precluded the bank from recovering monies from the defendants owed under various promissory notes, credit agreements, and/or guaranties, the court affirmed some of the judgments and reversed others because the fact that the bank did not seek to have the sales of the realty confirmed was irrelevant to the defendant's liability. First Citizens Bank & Trust, Inc. v. Ruddell, 330 Ga. App. 82, 766 S.E.2d 538 (2014).

Issue of standing irrelevant to confirmation proceeding. — Trial court did not err in confirming and approving a foreclosure sale pursuant to O.C.G.A. § 44-14-161 because the issue of a bank's standing to bring the confirmation action against the guarantors was not relevant to the confirmation proceeding which was commenced in accordance with O.C.G.A. § 44-14-161(a); standing issues are outside the scope of a confirmation hearing. Boring v. State Bank & Trust Co., 307 Ga. App. 93, 704 S.E.2d 207 (2010).

Property owner's claim that a bank was not a real party in interest was not relevant to a confirmation proceeding pursuant to O.C.G.A. § 44-14-162, as the matter was commenced in accordance with O.C.G.A. § 44-14-161(a) by the person instituting the foreclosure proceedings; issues of standing and assignment were irrelevant to the confirmation proceeding. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. 2012).

Confirmation properly denied. — Order denying a creditor's application for confirmation of a foreclosure sale was proper because the trial court, as the trier of fact, was authorized to weigh the evidence and judge the credibility of both experts to conclude that the creditor's expert's valuation under the discounted cash model was unreliable and the builder's expert, who used the bulk sales comparison approach, was more credible and used a more appropriate method. Eagle GA I SPE, LLC v. Atreus Cmtys. of Fairburn, Inc., 319 Ga. App. 844, 738 S.E.2d 675 (2013).

Consummation.

There was evidence to support the trial court's finding that a foreclosure sale was consummated because a bank presented the testimony of an attorney that the attorney witnessed the foreclosure sale at issue, that the foreclosure sale occurred outside the annex of the county courthouse, that the sale consisted of several lots, which the attorney identified by their lot numbers, that the foreclosure notice was read in the notice's entirety and the sale was opened for bidding, that the bank submitted an opening bid, and that there were no other bidders. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

Trial court properly declared that a bank's first nonjudicial foreclosure sale was not valid because the bank never consummated the bank's successful bid at the sale of the property securing the loan since the transfer of the borrower's right of possession and the bank's equity of redemption to the bank as the foreclosure sale purchaser never occurred; the bank did not transfer the borrower's right of possession to itself as the first foreclosure sale purchaser at the sale, and the bank did not apply sale proceeds to eliminate or reduce the borrower's obligation under the secured promissory note. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. 2012).

Compliance with section required before bringing action for deficiency

judgment.

Trial court's holding that a bank was not required to confirm a second nonjudicial foreclosure sale under O.C.G.A. § 44-14-161 before pursuing an action for a deficiency judgment against a guarantor was an erroneous advisory opinion because the bank did file a confirmation petition and, thus, the parties failed to show under O.C.G.A. § 9-4-2(a) that there was any justiciable controversy on the issue of whether it was required to do so. Building Block Enterprises, LLC v. State Bank & Trust Company, 314 Ga. App. 147, 723 S.E.2d 467 (2012), cert. denied, No. S12C1053, 2012 Ga. LEXIS 553 (Ga. 2012).

Failure to comply with confirmation requirements precludes deficiency judgment. — Trial court erred by granting a note holder a deficiency judgment because since the note holder did not obtain a judgment on the note against the debtor prior to the foreclosure sale, it was required to comply with the confirmation requirements of O.C.G.A. § 44-14-161 in order to obtain a deficiency judgment on the note. HWA Props., Inc. v. Cmty. & S. Bank, 322 Ga. App. 877, 746 S.E.2d 609 (2013).

Confirmation not required.

Bank that ceased efforts to foreclose on real estate securing borrowers' and guarantors' notes evidencing obligations to the bank and sued the borrowers and guarantors on the notes, brought a suit that was not an improper deficiency action, due to the bank's failure to obtain confirmation, because the bank was not required to obtain confirmation since: (1) no sale was consummated; (2) the bank could both sue on the notes and foreclose until the debt was paid; and (3) the borrowers and the guarantors were not harmed, as the borrowers' and the guarantors' interests were the same before and after the attempted sale, and no negligence, fraud, collusion, or bad faith was shown. Tampa Inv. Group, Inc. v. Branch Banking & Trust Co., 290 Ga. 724, 723 S.E.2d 674 (2012).

Dragnet clause contained in initial loans did not effectively merge debts into one debt requiring judicial confirmation of the foreclosure sale because the loans made to debtors and a limited liability company (LLC) were separate; the debtors and a banks' predecessor were the original parties to the loans made to the debtors, and the LLC and another bank were the original parties to the loan made to the LLC. 3 West Invs., LLC v. Hamilton State Bank, 316 Ga. App. 796, 728 S.E.2d 843 (2012), cert. denied, No. S12C1886, 2012 Ga. LEXIS 982 (Ga. 2012).

Because loans made to debtors were separate from a loan made to a limited liability company (LLC), confirmation of the nonjudicial foreclosure sale under O.C.G.A. § 44-14-161(a) was not required in order for a bank to pursue collection under the loan to the LLC. 3 West Invs., LLC v. Hamilton State Bank, 316 Ga. App. 796, 728 S.E.2d 843 (2012), cert. denied, No. S12C1886, 2012 Ga. LEXIS 982 (Ga. 2012).

Because a lender was not seeking a deficiency judgment when the lender sued the guarantors of a mortgage loan, the denial of confirmation did not preclude the lender from obtaining a judgment against the guarantors for the difference between what the lender paid in the foreclosure sale and the unpaid balance of the debt, including taxes, penalties, and interest. Inland Mortg. Capital Corp. v. Chivas Retail Partners, LLC, 740 F.3d 1146 (7th Cir. 2014).

Failure to provide proof of confirmation did not prevent IRS from recognizing debtor's discharge-of-indebtedness income. — IRS was entitled to summary judgment on Chapter 7 debtors' claim that it miscalculated the amount of income the debtors had in 2006 when it added $19,898 to their income because a mortgage company forgave $19,898 of a $189,898 debt the debtors owed after it foreclosed a mortgage and sold the debtors' house for $170,000. The mortgage company's failure to provide proof that the sale was confirmed by a state court, pursuant to O.C.G.A. § 44-14-161 et seq., did not prevent the IRS from recognizing the debtors' discharge-of-indebtedness income. Godfrey v. IRS (In re Godfrey), No. 08-10409-WHD, 2009 Bankr. LEXIS 3581 (Bankr. N.D. Ga. Aug. 31, 2009).

Assignee could pursue confirmations. — Superior court correctly construed O.C.G.A. § 44-14-161 and properly

Confirmation and Approval of Sale (Cont'd)

4. Confirmation (Cont'd)

allowed an assignee to pursue the confirmations of foreclosure sales because to the extent deficiencies remained after the foreclosures with respect to the underlying indebtedness, claims therefore belonged to the assignee; the original creditor of the underlying notes and the entity that instituted the foreclosure proceedings transferred the notes to the assignee. Titshaw v. Northeast Ga. Bank, 304 Ga. App. 712, 697 S.E.2d 837 (2010).

Confirmation not required when debts are not inextricably intertwined. — Creditor, who foreclosed on three different tracts of land, each of which secured separate promissory notes, was able to seek a deficiency judgment on two notes, despite not having confirmed the foreclosure sale pursuant to O.C.G.A. § 44-14-161(a), because the debts at issue were not "inextricably intertwined." In re Cox, 456 B.R. 592 (Bankr. N.D. Ga. 2011).

Confirmation of intertwined debts. As a maker's two debts to a bank were incurred for the same purpose, were secured by the same property, and both contained a cross-default clause, the two debts were inextricably intertwined. Thus, the bank's suit on the second promissory note constituted a claim for a deficiency judgment requiring judicial confirmation under O.C.G.A. § 44-14-161(a) of the foreclosure sale associated with the first note, and any further action by the bank to recover against the maker on the second note was barred by the bank's failure to comply with § 44-14-161(a). Iwan Renovations, Inc. v. N. Atlanta Nat'l Bank, 296 Ga. App. 125, 673 S.E.2d 632 (2009).

Lender's foreclosure sales and deficiency judgments were barred by O.C.G.A. § 44-14-161(a) because the lender failed to get judicial confirmation of the debts, which were inextricably intertwined- in that they were incurred for the same purpose, secured by the same property, held by the same creditor, and owed by the same debtor. Bank of N. Ga. v. Windermere Dev., Inc., 316 Ga. App. 33, 728 S.E.2d 714 (2012).

Erroneous hearsay ruling did not warrant reversal. — Superior court did not err in confirming the nonjudicial foreclosure sale because the court's erroneous hearsay ruling was not harmful and did not warrant reversal; the ruling did not deprive a construction company and guarantors of an evidentiary basis to support their challenge to the regularity of the sale, and the superior court had a sufficient record to consider their argument and find that the sale was regular. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140 (2012).

Supersedeas does not apply to foreclosure confirmation proceeding. — Trial court erred by dismissing an investment company's request for confirmation of a second foreclosure sale under O.C.G.A. § 44-14-161(c) by finding that a supersedeas arose from the mortgagor's appeal because the supersedeas statute, O.C.G.A. § 5-6-46(a), expressly only applied to civil cases, and did not apply to a foreclosure confirmation proceeding. Summit Inv. Mgmt. Acquisitions I, LLC v. Greg A. Becker Enters., Ltd., 317 Ga. App. 608, 732 S.E.2d 286 (2012).

5. True Market Value

Appellate review of "market value." Because a bank's appraiser correctly deducted the cost to complete the homes on the owners' properties from the "subject to" market value of the properties, and because the basis for the appraiser's opinion amounted to more than sheer speculation, the trial court's foreclosure confirmation order complied with O.C.G.A. § 44-14-161(b) by including findings of fact that supported the conclusion that each of the properties sold for the property's true market value. McBryar v. Branch Banking & Trust Co., 305 Ga. App. 857, 700 S.E.2d 731 (2010).

Appellate court's review of the trial court's determination that a lender failed to produce evidence of the true market value is whether the record contains any evidence to support the findings of the trial court, and whether the appellate court views the evidence in the light most favorable to the trial court's judgment because O.C.G.A. § 44-14-161 specifically refers to "real estate" and "land" as the

subject of the confirmation of sale procedure, not leased estates. GCCFC 2007-GGP Abercorn St. Ltd. P'ship v. Abercorn Common, LLLP, 316 Ga. App. 879, 730 S.E.2d 589 (2012).

In reviewing the trial court's decision, the test is not whether the appellate court would have accepted a particular appraisal as the most reliable and accurate, but whether the record contains any evidence to support the findings of the trial court that the property brought the property's true market value at the foreclosure sale. Ga. Ltd. Partners, LLC v. City Nat'l Bank, 323 Ga. App. 766, 748 S.E.2d 131 (2013).

Appellate court will not disturb methodology.

Trial court's order confirming a foreclosure sale of property for $14,800,000.00 was proper as a lienholder's appraiser testified that the property's value was $13,290,000.00; because the appraiser's opinions were not based on sheer speculation, the appellate court did not second-guess the methodology. Wilson v. Prudential Indus. Props., LLC, 276 Ga. App. 180, 622 S.E.2d 890 (2005).

In a foreclosure action, because the appeals court could not second guess the methodology used by an expert in appraising the market value of the property at issue, and the trial court had sufficient data to derive its own opinion as to the market value of the property at the time of the sale, it properly confirmed the foreclosure sale. Chamblee Hotels, LLC v. Chesterfield Mortg. Investors, Inc., 287 Ga. App. 342, 651 S.E.2d 447 (2007), cert. denied, 2008 Ga. LEXIS 75 (Ga. 2008).

Appraisal that occurred five weeks before sale sufficient. — Because there was evidence of the parcels' value about five weeks before the foreclosure sales occurred, the appraisal date was relatively close to the date of the foreclosure sales, which was sufficient for the trial court to confirm the sales as required under O.C.G.A. § 44-14-161. LRD, LLC v. State Bank & Trust Co., 326 Ga. App. 644, 757 S.E.2d 251 (2014).

Expert testimony. — Assuming that the superior court erred by concluding that, under O.C.G.A. § 44-14-161(b), the parties were limited to introducing evidence of the properties' value on only the date of the foreclosure sale, the borrowers induced the error and could not complain because the borrowers specifically argued to the superior court that the lender's evidence had to be excluded since the condition of the property after the foreclosure sale was not relevant to the true market value at the time of the sale; the borrowers did not show that the superior court disregarded their expert's testimony for valuing the property. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561 (2011).

Superior court did not err in confirming a foreclosure sale because the lender's expert explained the basis for the expert's methodology and testified about the sources upon which the expert relied, and as it appeared that the expert's opinion was not based on sheer speculation, the appellate court could not second-guess any methodology utilized to reach the opinion; the superior court expressly invited the borrowers to cross-examine the expert about the basis of the expert's opinions to verify that the opinions were not based on an inspector's condition report. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561 (2011).

Superior court did not err in confirming the nonjudicial foreclosure sale of a hotel leasehold interest held by a lender under a deed securing a promissory note a construction company executed because there was competent evidence supporting the superior court's finding that the auction brought the true market value for the property; the superior court found the lender's expert credible and the valuation methodology sound. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140 (2012).

Trial court did not abuse the court's discretion by admitting the expert testimony proffered by the mortgagee because the testimony was sufficient, competent evidence supporting the finding that the foreclosure sale should be confirmed and provided proof of the true market value as of the date of the foreclosure sale. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014).

Hearsay evidence insufficient to

Confirmation and Approval of Sale (Cont'd)
5. True Market Value (Cont'd)

support finding of true market value. — At a foreclosure confirmation hearing held under O.C.G.A. § 44-14-161, a trial court erred in relying on three appraisal reports to find that the foreclosed properties were sold at fair market value because the reports were hearsay: although the appraiser was present, the appraiser did not testify, and the bank's attorney merely stated in the appraiser's place that the sales were made at fair market value. Belans v. Bank of Am., 303 Ga. App. 35, 692 S.E.2d 694 (2010).

Bulk sales analysis upheld. — Trial court did not err in confirming a foreclosure sale under O.C.G.A. § 44-14-161(b) even though expenses and carrying costs were deducted in determining true market value of the subdivision property and even when a bulk sales analysis resulted in a lower true market value than an analysis of each individual lot contained on the property. Trefren v. Freedom Bank, 300 Ga. App. 112, 684 S.E.2d 144 (2009).

Trial court did not err in confirming foreclosure sales pursuant to O.C.G.A. § 44-14-161 because there was evidence to support the court's finding that the two properties sold for their true market value at foreclosure sale; although the appraisal of the bank's expert did not specifically provide the separate true market value for each parcel of lots, the expert's testimony and appraisal provided the methodology by which the separate value of each parcel could be obtained, i.e., multiplying the true market value of each lot by the number of lots in each parcel, and it was clear from the appraisal reports and testimony of the bank's expert and the expert of the debtor and guarantor that the valuation of each parcel would not change if the properties were sold separately or together as a bulk transaction. Battle Props. v. Branch Banking & Trust Co., 310 Ga. App. 217, 712 S.E.2d 625 (2011).

Evidence sufficient to show the fair market value. — Creditor's testimony regarding assignment of note and deed of trust from a bank to the creditor established that the assignments were made, although the issue of whether the creditor, as the person instituting the foreclosure action, was the real party in interest was irrelevant to a confirmation proceeding; the creditor's testimony about the creditor's experience with the property, how much the creditor had invested in it, how much the creditor's borrowed against it, its condition at the time of the foreclosure sale, and the creditor's opinion that he bid the fair market value for the property, along with the testimony of one of the buyers and the tax appraisal, was sufficient to show the fair market value of the property at the time of the sale. McCain v. Galloway, 267 Ga. App. 505, 600 S.E.2d 449 (2004).

Mortgagee was entitled to confirmation of a foreclosure sale because the mortgagee showed that the property at issue sold for true market value as required under O.C.G.A. § 44-14-161 because a deduction by the mortgagee's expert for loss of rental income due to the incompletion of buildings on the property was proper as the property was worth more fully rented. Nash v. Compass Bank, 296 Ga. App. 874, 676 S.E.2d 28 (2009).

Lender's appraiser's opinion as to foreclosed property's true market value at the time of foreclosure was properly admitted under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702). The lender's expert's appraisal was based upon extensive facts and careful analysis taking into account the potential for future recovery of a down real estate market by the discounted flow method, which the borrower conceded was reliable. Blue Marlin Dev., LLC v. Branch Banking & Trust Co., 302 Ga. App. 120, 690 S.E.2d 252 (2010).

Trial court did not err in confirming a nonjudicial sale of certain property since the trial court was not required to disregard the valuation opinion of the mortgagee's appraiser merely because it was based on the existing one-unit configuration of the property, and the evidence was sufficient to show that the appraiser's opinion was not based on sheer speculation; nothing in O.C.G.A. § 44-14-161 or prior case law requires a trial court in every instance to adopt the highest and best use as the basis for determining true market value and to reject any appraisal which was not explicitly based on the property's highest

and best use. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300 (2010).

Trial court did not err in finding find that a property's "as-is" value, rather than a value based on its "highest and best use," was the true market value for purposes of O.C.G.A. § 44-14-161(b), because two appraisers agreed on the value of the property as a single unit, and the trial court's finding that there was no variance between the experts as to the "true market value" of the property was construed to reflect that fact and not a misunderstanding as to the nature of the evidence; the trial court acknowledged that there was a dispute as to what the true value was and then ruled that the highest and best use of the property was not its proper value. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300 (2010).

Sufficient evidence supported confirmation of a lender's application for a foreclosure sale under O.C.G.A. 44-14-161(b) because the appraiser used a valid valuation method, and the appraisal was supported by competent evidence showing that the property's true market value was equivalent to the price the lender paid at a nonjudicial foreclosure sale. Greenwood Homes, Inc. v. Regions Bank, 302 Ga. App. 591, 692 S.E.2d 42 (2010).

Evidence supported a trial court's conclusion that properties were sold for their true fair market values because there was no testimony as to the value of any personal property, and the record showed that the foreclosure sale involved only the sale of real property; a bank's expert appraiser testified as to the methodology the appraiser used to determine the value of each property sold, and the appraiser testified that the properties in the first sales had no appliances therein and that some in the third had no flooring, carpet, or appliances. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889 (2010).

Sufficient evidence supported the trial court's confirmation of a foreclosure sale pursuant to O.C.G.A. § 44-14-161 because the appraiser relied on the factual data collected by the appraiser's staff for the appraiser's valuation of the property, not on the staff's opinions as to the value of the property, and there was no evidence that the appraiser's valuation was based on sheer speculation; O.C.G.A. § 44-14-161(b) does not preclude any specific method of property appraisal. Boring v. State Bank & Trust Co., 307 Ga. App. 93, 704 S.E.2d 207 (2010).

Trial court did not err in confirming a non-judicial foreclosure sale of property to a bank because the record contained sufficient evidence to permit the trial court to determine that the foreclosure sale brought at least the true market value of the property as required by O.C.G.A. § 44-14-161(b) when the scope of an appraisal addendum included a re-inspection of the property and a review of changes in market conditions since the first appraisal and through the date of the foreclosure sale; even if the appraiser's recurring valuation for the property and cost-to-complete calculations strained credulity, the trial court was presented with additional, uncontested evidence to support the court's finding that the property sold for at least the property's true market value because the appraiser testified that the appraiser received no direction from the bank about the total to return when the appraiser reached $480,000 for the second time, and there was evidence that the true market value of the property could have actually been less than what the bank paid for the property. Atreus Cmtys. of Am., LLC v. KeyBank Nat'l Ass'n, 307 Ga. App. 716, 706 S.E.2d 107 (2011).

Trial court did not err in confirming a foreclosure sale by a bank because the trial court was authorized to find that the bank's winning bid at the sale represented the true market value of the property; the trial court was entitled to rely upon the valuation of the property by the bank's expert, including the expert's utilization of a 15 percent discount for builder/buyer risk in valuing the uncompleted house on the property, because the expert testified that the calculation was arrived at based on the expert's consultation with two separate homebuilders, and the expert arrived at the ultimate valuation after inspecting the uncompleted, vandalized home and assessing the condition of the surrounding subdivision. Jimmy Britt

Confirmation and Approval of Sale (Cont'd)
5. True Market Value (Cont'd)

Builders, Inc. v. Suntrust Bank, 307 Ga. App. 663, 706 S.E.2d 665 (2011).

Because a foreclosure sale reflected the price that would be obtained in a sale under usual market conditions, and because deductions such as carrying costs and entrepreneurial profit factored directly into the price a willing buyer would pay for the properties, the trial court properly determined the properties' true market value under O.C.G.A. § 44-14-161(b). Henderson Prop. Holdings, LLC v. Sea Island Bank, 310 Ga. App. 795, 714 S.E.2d 382 (2011), cert. denied, No. S11C1787, 2011 Ga. LEXIS 991 (Ga. 2011).

Trial court did not err in confirming a nonjudicial foreclosure sale because the borrowers did not object to the testimony or the reports of the lender's appraiser as to the fair market value of the property, and there was no evidence that the appraiser's opinion was based on sheer speculation. O.C.G.A. § 44-14-161(b) did not preclude any specific method of property appraisal. Ivy Rd. Props., LLC v. First Citizens Bank & Trust Co., 311 Ga. App. 409, 715 S.E.2d 809 (2011).

Superior court did not err in confirming a foreclosure sale because the borrowers did not show that the lender's scheduling and cancelling the foreclosure sale caused the properties to bring in less than the properties fair market value on the date of the sale. Eayrs v. Wells Fargo Bank, N.A., 311 Ga. App. 504, 716 S.E.2d 561 (2011).

Because the mortgage guarantors did not rebut an appraiser's revised opinion of the true market value of a property, and because the revised value was less than the amount a bank bid in the bank's foreclosure sale, the trial court properly determined that the bank's bid, which brought at least the true market value of the property, complied with O.C.G.A. § 44-14-161(b). Metro Land Holdings Invs., LLC v. Bank of Am., N.A., 311 Ga. App. 498, 716 S.E.2d 566 (2011).

Order confirming a non-judicial foreclosure sale was not erroneous because there was evidence supporting the trial court's finding that the subject properties sold for at least the properties' true market value; the bank introduced the written appraisal reports and expert testimony from the bank's appraiser, which showed that the first property sold for $1,500 less than the property's value, which was within the range of the property's true market value, and the trial court's decision to adopt the determination of the bank's expert that the highest and best use of the property would be residential, and the expert's valuation method of calculating the retail value of the property by utilizing the sales comparison approach and then discounting that value to achieve the property's true market value, was not in error. River Forest, Inc. v. United Bank, 320 Ga. App. 115, 739 S.E.2d 403 (2013).

Confirmation of a foreclosure sale of subdivided property for $530,000 was proper because there was some evidence that the fair market value of the lots was $5,500 to $6,600, which was considerably less than the actual sales price of $10,000 per lot, and the borrower's expert's opinion that the per lot value was $12,000 was not supported by any comparable sales. Lost Lake Dev. Corp. v. Cmty. & S. Bank, 325 Ga. App. 527, 754 S.E.2d 114 (2014).

Evidence insufficient.

Refusal to confirm a foreclosure sale was proper where the only evidence presented to the trial court as to the fair market value of the subject property was an appraisal submitted by an expert who failed to consider comparable properties close to the subject property which had much higher values than the more distant properties used by the assignees' expert, and which indicated that the true market value was much higher than the foreclosure sale price; the trial court found that the expert and the expert's appraisal were simply not believable. Foster v. Tycor, Inc., 267 Ga. App. 767, 601 S.E.2d 172 (2004).

Confirmation of nonjudicial foreclosure sales of certain properties did not comply with O.C.G.A. § 44-14-161 because the only evidence at the confirmation hearing regarding the properties' true market value was the testimony of the creditor's counsel, which was insufficient. Belans v. Bank of Am., N. A., 303 Ga. App. 654, 694 S.E.2d 725 (2010).

Superior court erred by confirming a

foreclosure sale because no construction of the record would have authorized a finding that the sale price was at least the true market value of the property; the foreclosure sale amount was a matter of fact, and neither evidence nor stipulation of such amount was presented to the trial judge. Titshaw v. Northeast Ga. Bank, 304 Ga. App. 712, 697 S.E.2d 837 (2010).

Because the sellers' appraiser failed to account for substantial improvements to the interior of the residence in developing the appraiser's opinion of the property's market value, the trial court properly denied the sellers' application for confirmation under O.C.G.A. § 44-14-161(b). Hammock v. Issa, 310 Ga. App. 547, 713 S.E.2d 717 (2011).

Superior court did not err in denying a lender's petition to confirm the foreclosure of a shopping center because the lender failed to convince the superior court, by a preponderance of the evidence, that the property sold for the property's true market value pursuant to O.C.G.A. § 44-14-161; the lender's expert appraised the leased fee interest in the property and not the fee simple interest. GCCFC 2007-GGP Abercorn St. Ltd. P'ship v. Abercorn Common, LLLP, 316 Ga. App. 879, 730 S.E.2d 589 (2012).

A "quick sale value", etc.

Trial court erred by confirming a foreclosure sale under O.C.G.A. § 44-14-161(b) based on an appraisal that discounted the value of each town home by $10,000 because the homes were in foreclosure because evidence of the "quick sale" value of the properties did not reflect the price that would have been obtained in a sale under the usual market conditions. Cartersville Developers, LLC. v. Ga. Bank & Trust, 292 Ga. App. 375, 664 S.E.2d 783 (2008).

Although a foreclosure sale price was the same as the quick sale value, and the experts were not informed about two higher offers for a portion of the property before their appraisals, reversal of a decision confirming the foreclosure sale was not required because the expert's opinion was not based solely on the quick sale value but on other factors. Mundy Mill Dev., LLC v. ACR Prop. Servs., LP, 306 Ga. App. 730, 703 S.E.2d 137 (2010).

Hearing

2. Issues

B. Notice to Debtor

Service by publication. — Service of a debtor by publication was found to be necessary by the trial court, and there was evidence to support this finding. One process server had attempted unsuccessfully to serve the guarantor at least 12 times, at four different addresses, and another attempted service at four different locations, including seven visits and hours of surveillance of what the server believed was the debtor's residence. Belans v. Bank of Am., 303 Ga. App. 35, 692 S.E.2d 694 (2010).

Trial court erred when the court found that a debtor was served properly because there was no evidence that the requirements of publication under O.C.G.A. § 9-11-4(f)(1) were met, and a bank offered no evidence to show that the notice requirements of O.C.G.A. § 44-14-161(c) were met; the published advertisement for service on the debtor provided no specifics as to the date or time of the confirmation hearing as was required under the confirmation statute, O.C.G.A. § 44-14-161. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

Notice held sufficient.

Notice publication of a confirmation hearing for nonjudicial foreclosure sales of certain properties was sufficient because two process servers had unsuccessfully tried to personally serve a guarantor, including 12 attempts at four different locations. Belans v. Bank of Am., N. A., 303 Ga. App. 654, 694 S.E.2d 725 (2010).

Trial court did not err in concluding that the debtors had been properly served pursuant to O.C.G.A. §§ 9-11-4 and 44-14-161(c) because there was undisputed evidence from which the trial court could have concluded that the debtors were attempting to evade service; a private process server, who had a description of a vehicle that had been parked at the address of one of the debtors, saw the vehicle and followed the vehicle, but the driver noticed the server, drove past the address of the house, and when the server pulled into the driveway after the driver

Hearing (Cont'd)
2. Issues (Cont'd)
B. Notice to Debtor (Cont'd)

and approached the garage door, which was not yet closed, and announced that the server had papers, no one responded. Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 708 S.E.2d 604 (2011).

C. Advertisement

Advertisement sufficient.

Trial court's conclusion that the advertisement of foreclosure sales conformed to O.C.G.A. § 44-14-161 was supported by competent evidence because a bank's attorney testified that the attorney caused the advertisements to be run and provided the four dates upon which the advertisements were published during the month preceding the sale; the attorney also testified that the legal descriptions in the newspaper matched that contained in the security deeds and the deeds under power of sale. Belans v. Bank of Am., N.A., 306 Ga. App. 252, 701 S.E.2d 889 (2010).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took its interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the interest taken under the deed and available at the foreclosure sale. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140 (2012).

Admission of publisher's affidavit and tear sheet from newspaper indicating advertisement of foreclosure sale was published held proper. — In a foreclosure matter under O.C.G.A. § 44-14-161, a trial court's admission of the publisher's affidavit and the tear sheet from the newspaper which indicated that the advertisement of the foreclosure sale was published on each of four listed dates, was proper, as those documents were not hearsay. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. 2012).

3. Debtor's Rights

No right to jury trial. — There is no right to a jury trial on an application for confirmation under O.C.G.A. § 44-14-161. BBC Land & Dev., Inc. v. Bank of N. Ga., 294 Ga. App. 759, 670 S.E.2d 210 (2008).

4. Evidence

Evidence supported approval of a bank's foreclosure sale because the bank's expert testified that: (1) the value of the property did not exceed the amount paid by the bank; (2) the expert used both a cost and a market approach to determine the property's value; (3) the expert considered the percentage of the property that consisted of wetlands; and (4) the expert verified the comparable sales used to form the expert's opinion. Statesboro Blues Dev., LLC v. Farmers & Merchants. Bank, 301 Ga. App. 851, 690 S.E.2d 205 (2010).

5. Review

Objection too late. — Guarantor did not preserve for review the assertion that the report of the third sale was untimely because the objection to the timeliness of the report of the third sale did not come until the appeal following entry of the first confirmation order. Belans v. Bank of Am., N.A., 309 Ga. App. 208, 709 S.E.2d 853 (2011).

Resale

1. Discretion of Court

No presumption in favor of resale. — No presumption exists in favor of resale and there is no entitlement to a resale, either for mere failure to show the sale brought true market value, for a mere flawed appraisal, or for any reason. Sanusi v. Cmty. & S. Bank, 330 Ga. App. 198, 766 S.E.2d 815 (2014).

Denial of resale not an abuse of discretion. — Trial court did not abuse the court's discretion in denying a resale because the creditor failed to show that

either the trial court's ruling was unsupported by any evidence or that the court's ruling misstated or misapplied the relevant law. The creditor should have detected the flaws in the appraisal upon which the creditor relied as the creditor's decision-maker had the experience, sophistication, and resources to detect the flaws. RES-GA LJY, LLC v. Y. D. I., Inc., 322 Ga. App. 607, 745 S.E.2d 820 (2013).

Resale order has the effect of setting aside prior sale. — Following confirmation of a foreclosure sale, the debtor argued that the lender did not have title to the property because the trial court had not rescinded an earlier foreclosure sale; however, the trial court's resale order had the effect of setting aside the first sale. Further, a challenge to title fell outside the ambit of a confirmation proceeding. Yellow Creek Invs., LLC v. Multibank 2009-1 CRE Venture, LLC, 329 Ga. App. 577, 765 S.E.2d 728 (2014).

There is no abuse of discretion by the trial court in ordering a resale, etc.

Trial court did not err by ordering a resale of property after the court declined to confirm a nonjudicial foreclosure sale, as there was nothing to show that the court did not base the court's order on the court's own discretion or that the court acted under any belief in a mandate to order a resale simply because the property failed to sell for fair market value pursuant to O.C.G.A. § 44-14-161(c). Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012).

2. Good Cause

Good faith.

Trial court did not err by ordering a resale of property after the court declined to confirm a nonjudicial foreclosure sale as, pursuant to O.C.G.A. § 44-14-161(c), the court focused on the appropriate "good cause" standard rather than a standard based on "good faith"; the resale was properly ordered when the bank acted in good faith and when the property failed to sell for the property's true market value. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012).

Failure to prove good cause. — Trial court erred in ordering property to be resold under O.C.G.A. § 44-14-161(c) because the mortgagee did not meet the mortgagee's burden of proving good cause for the resale, and the mortgagor did not have the opportunity to defend against the same; by agreement of the parties and with the express consent of the trial court, the remaining issues relevant to the confirmation proceeding had been reserved for a later hearing, and thus, when the trial court ordered the resale, it had neither heard argument nor received any evidence related to the other aspects of the foreclosure sale or the desired outcome of the confirmation proceeding. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572 (2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18 Am. Jur. Pleading and Practice Forms, Mortgages, § 193.

44-14-162. Sales made on foreclosure under power of sale — Manner of advertisement and conduct necessary for validity; filing.

(a) No sale of real estate under powers contained in mortgages, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale shall have been

given as required by Code Section 44-14-162.2. If the advertisement contains the street address, city, and ZIP Code of the property, such information shall be clearly set out in bold type. In addition to any other matter required to be included in the advertisement of the sale, if the property encumbered by the mortgage, security deed, or lien contract has been transferred or conveyed by the original debtor to a new owner and an assumption by the new owner of the debt secured by said mortgage, security deed, or lien contract has been approved in writing by the secured creditor, then the advertisement should also include a recital of the fact of such transfer or conveyance and the name of the new owner, as long as information regarding any such assumption is readily discernable by the foreclosing creditor. Failure to include such a recital in the advertisement, however, shall not invalidate an otherwise valid foreclosure sale.

(b) The security instrument or assignment thereof vesting the secured creditor with title to the security instrument shall be filed prior to the time of sale in the office of the clerk of the superior court of the county in which the real property is located. (Ga. L. 1935, p. 381, § 2; Ga. L. 1981, p. 834, § 1; Ga. L. 2001, p. 856, § 1; Ga. L. 2008, p. 624, § 1/SB 531.)

The 2008 amendment, effective May 13, 2008, designated the existing provisions as subsection (a), and added subsection (b).

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Notice
Conduct of Sale

General Consideration

Issues of standing and assignment not relevant. — Property owner's claim that a bank was not a real party in interest was not relevant to a confirmation proceeding pursuant to O.C.G.A. § 44-14-162 as the matter was commenced in accordance with O.C.G.A. § 44-14-161(a) by the person instituting the foreclosure proceedings; issues of standing and assignment were irrelevant to the confirmation proceeding. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. 2012).

Assignment recorded after notice of sale. — Because Georgia law requires only that the foreclosing entity record the security deed prior to the time of sale, that the assignment was recorded after the notice of sale under power was first published did not affect the trustee's authority to foreclose on the property after recordation. Phillips v. Ocwen Loan Servicing, No. 1:12-cv-3861-WSD, 2014 U.S. Dist. LEXIS 127763 (N.D. Ga. Sept. 12, 2014).

Preservation for review. — Property owner's claim that a foreclosure advertisement did not comply with O.C.G.A. §§ 9-13-140(a) and 44-14-162 was waived on appeal due to the owner's failure to

comply with Ga. Ct. App. R. 25(a)(1); the owner did not show how the enumeration of error was preserved for review, and it did not provide any relevant citation to the record to show that the claim of error was raised below. White Oak Homes, Inc. v. Cmty. Bank & Trust, 314 Ga. App. 502, 724 S.E.2d 810 (2012), cert. denied, No. S12C1120, 2012 Ga. LEXIS 671 (Ga. 2012).

Resale of property when first sale invalid. — Trial court did not err in allowing a bank to resell property because the first foreclosure sale was invalid and, therefore, inoperative, and the bank cured the invalidity by conducting a second foreclosure; when the lender is also the purchaser at an invalid sale the lender can treat the sale as void and resell the property in the manner that the lender should have sold the property in the first place. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 726 S.E.2d 54 (2012).

Trial court did not err in allowing a bank to resell property because the borrower did not show that the bank acted in bad faith during the foreclosure process; the bank undertook to remedy the defect in the first foreclosure sale by dismissing the action to confirm the sale and by proceeding to foreclose again, after the assignment had been recorded. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 726 S.E.2d 54 (2012).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117 (2012).

Notice

Failure to meet notice requirements.

Advertisement which a bank published when the bank sold a bowling alley at a foreclosure sale, which provided a metes and bounds description of the property, was sufficient under O.C.G.A. §§ 9-13-40 and 44-14-162 to foreclose on and convey title only to the real property, and a trial was required to determine the amount of money the bank had to turn over to a Chapter 7 debtor's bankruptcy estate under 11 U.S.C. § 542 because the bank improperly sold the debtor's personal property. The court found that it could not determine on summary judgment whether bowling alley lanes and pin setters the bank sold were fixtures or personal property, and the court ordered the parties to present evidence on that issue at trial. Lubin v. Ga. Commerce Bank (In re Southern Bowling, Inc.), No. 09-06045, 2010 Bankr. LEXIS 4007 (Bankr. N.D. Ga. Oct. 8, 2010).

Trial court's grant of summary judgment to a mortgagee was error in property owners' wrongful foreclosure action, as the foreclosure was invalid under O.C.G.A. § 44-14-162(a) since the notice did not comply with O.C.G.A. § 44-14-162.2(a); the notice not only did not properly identify the secured creditor, but rather, the notice misidentified the creditor. Reese v. Provident Funding Assocs., LLP, 317 Ga. App. 353, 730 S.E.2d 551 (2012).

There remained a material question of fact as to plaintiff debtors' claim to set aside a foreclosure sale based on the lack of proper statutory notice called for in O.C.G.A. § 44-14-162(a) because, under O.C.G.A. § 44-14-162.2(b), nonjudicial foreclosure procedure required that a "copy" of the notice submitted to the publisher be sent to the debtor. The notice sent to the debtors differed from the one published. Rainey v. FMF Capital, LLC, No. 1:11-CV-0364-CAP, 2012 U.S. Dist. LEXIS 117200 (N.D. Ga. Mar. 30, 2012).

Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against the borrower's lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162(a) and 44-14-162.2. Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545 (2013).

Notice of foreclosure sale held sufficient. — Bank gave proper statutory

Notice (Cont'd)

notification of a foreclosure sale to property owners pursuant to O.C.G.A. § 44-14-162(a) when the bank sent to the property's address and the property owners' primary residence, by certified mail, a written notice of the foreclosure sale that specified the bank as the foreclosing party by name, address, and telephone number pursuant to O.C.G.A. § 44-14-162.2. Mortensen v. Bank of Am., N.A., No. (CDL), 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Foreclosure notice sent by a loan servicer or agent of a secured party was not defective under O.C.G.A. § 44-14-162. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Foreclosure advertisement sufficient. — Foreclosure sale advertisement of a condominium development was sufficient although the advertisement did not note that several units in the development had been sold prior to the foreclosure. The description of the property was correct in itself, and the excepted units were identified on the courthouse steps at the time of the sale. Dan Woodley Cmtys., Inc. v. Suntrust Bank, 310 Ga. App. 656, 714 S.E.2d 145 (2011).

Superior court did not err in finding that a lender's advertisement of a nonjudicial foreclosure sale properly included a description of the property in accordance with O.C.G.A. § 9-13-140(a) because the legal description in the advertisement was identical to the description in the security deed by which the lender took the lender's interest from a construction company and guarantors; thus, there was no discrepancy between the two, and the advertisement properly reflected the interest taken under the deed and available at the foreclosure sale. Diplomat Constr., Inc. v. State Bank of Tex., 314 Ga. App. 889, 726 S.E.2d 140 (2012).

Sale properly confirmed. — Trial court did not err in confirming the November sale of certain real estate in a foreclosure action because the mortgagor failed to show that it was deprived of any protection afforded by O.C.G.A. § 44-16-161 as the confirmation proceeding commenced in connection with the November sale comprised a new action after the July sale was invalidated, all of the advertisement requirements were met, and the property was sold for its true market value. Howser Mill Homes, LLC v. Branch Banking & Trust Co., 318 Ga. App. 148, 733 S.E.2d 441 (2012).

Sale must be advertised in every county where property located. — Trial court did not err in denying a mortgagee's application for confirmation of a nonjudicial foreclosure sale because the court properly ruled that the mortgagee's advertisement failed to comport with the statutory requirements of O.C.G.A. § 44-14-162(a); a sale of real property under a power of sale made pursuant to § 44-14-162(a) must be advertised in every county where the property or any portion of the property is located. Nicholson Hills Dev. v. Branch Banking & Trust Co., 316 Ga. App. 857, 730 S.E.2d 572 (2012).

Conduct of Sale

Manner of sales.

Given evidence that a security deed was delivered to the clerk's office at 9:41 a.m. on the morning of the day of a foreclosure sale, and because the legal hours of sales were from 10:00 a.m. to 4:00 p.m., the assignment of the security deed to the assignee was filed prior to the sale as required by O.C.G.A. § 44-14-162(b). L & K Enters., LLC v. City National Bank, N.A., 326 Ga. App. 744, 755 S.E.2d 270 (2014).

Confirmation of sale.

Trial court did not err by confirming a foreclosure sale because issues as to whether the foreclosing bank recorded an assignment of the deed to secure debt before the foreclosure sale and the validity of the assignment were irrelevant to the confirmation proceeding. River Walk Farm, L.P. v. First Citizens Bank & Trust Co., 321 Ga. App. 173, 741 S.E.2d 165 (2013).

Sale not consummated prior to bankruptcy. — Because a creditor conducted a foreclosure sale of a bankruptcy debtor's property shortly before the debtor filed a bankruptcy petition, the debtor retained a right of redemption which

passed to the bankruptcy estate since the sale was not consummated by payment of the bid amount and execution of a deed prior to the debtor's bankruptcy. Chase Home Fin. LLC v. Geiger (In re Geiger), 340 B.R. 422 (Bankr. M.D. Ga. 2006).

No entitlement to relief. — Borrower who claimed that a mortgage company, a company (LLC) that serviced the borrower's loan, the mortgage company's nominee, and the LLC's foreclosure counsel violated the borrower's rights when they refused to rescind a mortgage and foreclosed on investment property failed to allege facts which showed that the LLC or the nominee violated state law, the Truth in Lending Act, 15 U.S.C. § 1601 et seq., or the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., and the court denied the borrower's request for a temporary restraining order or a preliminary injunction prohibiting foreclosure. The borrower incorrectly cited O.C.G.A. § 44-14-236 as the basis for the borrower's claims under state law, and the borrower failed to allege facts that entitled the borrower to relief under O.C.G.A. § 44-14-162 et seq., Georgia's nonjudicial foreclosure statute. Hennington v. Greenpoint Mortg. Funding, Inc., No. 1:09-CV-00962-RWS, 2009 U.S. Dist. LEXIS 41343 (N.D. Ga. May 15, 2009).

Wrongful foreclosure claim sufficiently pled. — Trial court erred by dismissing the mortgagors' complaint for wrongful foreclosure because, construed in the light most favorable to the mortgagors, the complaint sufficiently alleged that the bank owed obligations to the mortgagors under the security deed and that the bank breached those contractual obligations by going forward with the foreclosure sale despite the error in the published foreclosure advertisements. Racette v. Bank of Am., N.A., 318 Ga. App. 171, 733 S.E.2d 457 (2012).

44-14-162.1. Sales made on foreclosure under power of sale — Mailing of notice to debtor — "Debtor" defined.

Law reviews. — For note, "Opportunity Costs: Nonjudicial Foreclosure and the Subprime Mortgage Crisis in Georgia," see 25 Ga. St. U.L. Rev. 1205 (2009).

JUDICIAL DECISIONS

Notice of foreclosure held sufficient. — Trial court did not err in granting a bank and a law firm summary judgment in a former husband's action alleging that they wrongfully foreclosed on property that the husband obtained from his former wife via a divorce decree because the bank and law firm provided the wife with notice of the impending foreclosure sale as required under the terms of the security deed and O.C.G.A. § 44-14-162.2; because the husband did not obtain any legal interest in the property until the quitclaim deed from his wife was filed, he was not the owner of the property at the time the bank and law firm were required to provide notice of the foreclosure sale. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89 (2011).

Damages for wrongful foreclosure without notice. — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation, as that second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second bank's failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market

value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117 (2012).

Cited in TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300 (2010).

44-14-162.2. Sales made on foreclosure under power of sale — Mailing or delivery of notice to debtor — Procedure.

(a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor. The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. Nothing in this subsection shall be construed to require a secured creditor to negotiate, amend, or modify the terms of a mortgage instrument.

(b) The notice required by subsection (a) of this Code section shall be given by mailing or delivering to the debtor a copy of the notice of sale to be submitted to the publisher. (Ga. L. 1981, p. 834, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 1212, § 6; Ga. L. 2008, p. 624, § 2/SB 531.)

The 2008 amendment, effective May 13, 2008, in subsection (a), substituted "30 days" for "15 days" in the first sentence, inserted ", shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor," near the beginning of the second sentence, and added the last sentence; and, in subsection (b), deleted "the published legal advertisement or a copy of" preceding "the notice" and inserted "to be" near the end.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

Notice sufficient when sent to property address. — In an action that arose from foreclosure proceedings on two rental properties owned by the plaintiff, the plaintiff's claim for wrongful foreclosure pursuant to O.C.G.A. § 44-14-162.2 based on improper notice was dismissed because based on the plaintiff's concession that notices were sent to the rental properties it was clear that the notice defendants provided was sufficient; if the plaintiff wished to receive notice at a location other than the rental properties, the plaintiff was required to specify another address in writing, and the defendants' actual knowledge of the plaintiff's Califor-

nia address did not trigger a duty for the defendants to send the notice to that address. Desouza v. Fed. Home Mortg. Corp., No. 110-130, 2012 U.S. Dist. LEXIS 110288 (S.D. Ga. Aug. 6, 2012).

Borrower's claim that the lenders' notices of foreclosure were defective because the notices were mailed to the rental properties and not to the borrower's California residential address, in violation of O.C.G.A. § 44-14-162.2(a), was rejected because the borrower never notified the lenders of the borrower's address, although the lenders had actual knowledge of the borrower's address. DeSouza v. Fed. Home Mortg. Corp., No. 13-10116, 2014 U.S. App. LEXIS 13854 (11th Cir. July 16, 2014) (Unpublished).

Requirements for notice to debtor. — O.C.G.A. § 44-14-162.2 does not require a secured creditor to be identified in the notice to the debtors as all the statute requires is the name, address, and telephone number of the entity with authority to negotiate, amend, and modify the terms of the mortgage with the debtor. You v. JP Morgan Chase Bank, N.A., 293 Ga. 67, 743 S.E.2d 428 (2013).

Where a homeowner appealed a district court's decision to grant a Fed. R. Civ. P. 12(b)(6) motion in favor of a bank, the homeowner unsuccessfully contended that the foreclosure notice letter violated O.C.G.A. § 44-14-162.2 because it failed to identify the secured creditor. That statute did not categorically require the foreclosure notice to name either the secured creditor or the note holder. Abdullahi v. Bank of Am., 2013 U.S. App. LEXIS 23321 (11th Cir. Nov. 20, 2013) (Unpublished).

Notice of foreclosure sale held sufficient. — Because the debtor failed to send written notice of the correct address of the subject property to the bank or its agents, and could not assert an absent grantee's priority to escape the consequences of his own failure to provide a correct property address to all future holders of the note and deed, the foreclosure sale was not set aside; thus, the trial court properly granted summary judgment to the bank and the assignees of the security interest on the ground that the bank provided sufficient notice of the foreclosure sale. Jackson v. Bank One, 287 Ga. App. 791, 652 S.E.2d 849 (2007), cert. denied, 2008 Ga. LEXIS 169 (Ga. 2008).

Trial court did not err in confirming a nonjudicial sale of certain property because the mortgagee's notice of foreclosure substantially complied with the requirements of O.C.G.A. § 44-14-162.2 and was legally sufficient for purposes of confirming the sale since the notice included the name, address, and telephone number of the mortgagee's attorney; O.C.G.A. § 44-14-162.2 does not require the individual or entity be expressly identified as having full authority to negotiate, amend, and modify all terms of the mortgage. TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300 (2010).

Creditor's notice of a foreclosure sale that was sent to the debtor's original address listed in the loan documents complied with O.C.G.A. § 44-14-162.2, although the creditor was aware that the debtor had a new address. The debtor's obligation to provide written notice of the address change was not satisfied by a phone call to the creditor, nor the debtor's return address on the debtor's payment envelopes, nor even the creditor's actual notice of the new address. Colbert v. Branch Banking & Trust Co., 302 Ga. App. 687, 691 S.E.2d 598 (2010).

Trial court did not err in granting a bank and a law firm summary judgment in a former husband's action alleging that they wrongfully foreclosed on property that the husband obtained from the former wife via a divorce decree because the bank and law firm provided the wife with notice of the impending foreclosure sale as required under the terms of the security deed and O.C.G.A. § 44-14-162.2; because the husband did not obtain any legal interest in the property until the quitclaim deed from his wife was filed, the husband was not the owner of the property at the time the bank and law firm were required to provide notice of the foreclosure sale. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89 (2011).

Bank gave proper statutory notification of a foreclosure sale to property owners pursuant to O.C.G.A. § 44-14-162(a) when the bank sent to the property's address and the property owners' primary

residence, by certified mail, a written notice of the foreclosure sale that specified the bank as the foreclosing party by name, address, and telephone number pursuant to O.C.G.A. § 44-14-162.2. Mortensen v. Bank of Am., N.A., No. (CDL), 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Former spouse did not demonstrate that a bank and law firm failed to comply with O.C.G.A. § 44-14-162.2(a) because following the former spouse's alleged acquisition of the property, the former spouse provided no evidence that a written request was made that the bank and law firm send any notices regarding the property to a different address; thus, the bank and law firm complied with the statute by the certified mailing of the foreclosure notice to the property address. Farris v. First Fin. Bank, 313 Ga. App. 460, 722 S.E.2d 89 (2011).

Foreclosure Notice document — whose authenticity had not been challenged by plaintiff — clearly demonstrated that the Notice complied with all statutory requirements where the trustee was the proper secured creditor and was identified, the Notice was sent to the property address, which was authorized under the statute, and plaintiff had not alleged that plaintiff requested the Notice be sent to an alternate address. Bowman v. U.S. Bank Nat'l Ass'n, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

District court did not err in dismissing the debtor's wrongful foreclosure claim against the bank and a law firm without leave to amend because the debtor could no longer amend as a matter of course, and amending the complaint would be futile as the debtor alleged no facts suggesting that the bank did not have legal right to foreclose, and the record reflected that the bank, through the law firm, gave adequate notice, so the debtor would not have been able to state a claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, wrongful foreclosure claim, or trespass claim as each of those claims would have been predicated on improper foreclosure proceedings. Muhammad v. JPMorgan Chase Bank, NA, No. 13-13851, 2014 U.S. App. LEXIS 9901 (11th Cir. May 29, 2014) (Unpublished).

Notice of foreclosure proceedings sufficient. — Trial court did not err in granting summary judgment in favor of the mortgagee in a wrongful foreclosure action because the mortgagee submitted evidence that the mortgagee's attorney mailed written notice of the initiation of foreclosure proceedings on the mortgagor by certified mail and by regular mail to the property address and to the mortgagor's post office box and, although there is no evidence that the mortgagor received any of the notices, the evidence of the proof of mailing was sufficient. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49 (2014).

Trial court did not err in finding that the foreclosure notice satisfied the requirements of O.C.G.A. § 44-14-162.2 because the loan servicing corporation complied with the statute by sending the mortgagor a notice of foreclosure more than 30 days before the non-judicial foreclosure sale and the notice specifically informed the mortgagor that the loan servicing corporation had authority to negotiate, amend, and modify all terms of their note and security deed. Reese v. Provident Funding Assocs., LLP, 327 Ga. App. 266, 758 S.E.2d 329 (2014).

Material question of fact regarding sufficiency of notice. — There remained a material question of fact as to plaintiff debtors' claim to set aside a foreclosure sale based on the lack of proper statutory notice because, under O.C.G.A. § 44-14-162.2(b), nonjudicial foreclosure procedure required that a "copy" of the notice submitted to the publisher be sent to the debtor. The notice sent to the debtors differed from the one published. Rainey v. FMF Capital, LLC, No. 1:11-CV-0364-CAP, 2012 U.S. Dist. LEXIS 117200 (N.D. Ga. Mar. 30, 2012).

Notice held insufficient. — Trial court's grant of summary judgment to a mortgagee was error in property owners' wrongful foreclosure action, as the foreclosure was invalid under O.C.G.A. § 44-14-162(a) since the notice did not comply with O.C.G.A. § 44-14-162.2(a); the notice not only did not properly identify the secured creditor, but rather, the notice misidentified the creditor. Reese v. Provident Funding Assocs., LLP, 317 Ga. App. 353, 730 S.E.2d 551 (2012).

While the bank's first letter was sent by certified mail, it was not a notice of the initiation of proceedings to exercise a power of sale, but was an initial correspondence letter and the bank's second letter to the debtors was a notice of foreclosure sale for the property, but was only sent by first class mail, which did not satisfy the requirements of O.C.G.A. § 44-14-162.2(a). Peters v. CertusBank Nat'l Ass'n, 329 Ga. App. 29, 763 S.E.2d 498 (2014).

Actual receipt of properly mailed notice immaterial.

Trial court properly refused to set aside a foreclosure sale and a deed under a power of sale, as plaintiffs, first and second mortgagors, received the 15-day notice of the sale that was required by O.C.G.A. § 44-14-162.2; plaintiffs' failure to accept the certified letter containing the notice constituted receipt, as the letter was properly addressed and mailed to their post office box. Arrington v. Reynolds, 255 Ga. App. 291, 564 S.E.2d 870 (2002).

Although the debtors did not receive the Notice of Acceleration and Foreclosure because it was delivered to and signed for by their granddaughter who lives next door, it was undisputed that the Notice was correctly addressed. Accordingly, the lack of receipt was immaterial under Georgia law. 21st Mortg. Corp. v. Johnson (In re Johnson), No. 14-50695, 2015 Bankr. LEXIS 537 (Bankr. S.D. Ga. Feb. 18, 2015).

Complaint was not sufficient to state a claim. — Borrower was not allowed to add a claim under O.C.G.A. § 44-14-162.2 against the assignee lender since the claims were based on the assertion that the assignee did not have full authority to negotiate, amend, and modify the terms of the loan because it was merely a servicing agent, the Georgia Supreme Court had indicated that a servicing agent could have full authority within the meaning of § 44-14-162.2, and the assignee was specifically assigned both the security deed and the promissory note as well as all powers, options, privileges, and immunities arising under those instruments. Hall v. HSBC Mortg. Servs., No. 14-11626, 2014 U.S. App. LEXIS 17970 (11th Cir. Sept. 19, 2014) (Unpublished).

Complaint stated claim for wrongful foreclosure. — Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against his lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162.2 and 44-14-162(a). Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545 (2013).

Damages for wrongful foreclosure without notice. — In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation, as that second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second's bank failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008).

Application to foreclosure sales. — Trial court properly granted summary judgment to two banks in a purchaser's suit seeking the excess proceeds from two foreclosure sales and damages based upon claims that the banks failing to provide proper notice of the foreclosure sales as required by the Georgia Residential Mortgage Act, O.C.G.A. § 44-14-162.2, did not apply to the foreclosure sales at issue, rather, the statute only applies to the sale of a mortgage loan. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008).

Rescission of foreclosure sale. — Trial court properly granted summary judgment to a bank in a suit alleging wrongful rescission by a purchaser after the bank rescinded a foreclosure sale because the case law holding that substantial compliance with O.C.G.A. § 44-14-162.2 is sufficient in the notice to

the debtor did not apply retroactively to avoid the bank's avail of the safe harbor provision of O.C.G.A. § 9-13-172.1(d)(1). Stowers v. Branch Banking & Trust Co., 317 Ga. App. 893, 731 S.E.2d 367 (2012).

Proof of notice was insufficient to support motion to dismiss. — Court found that the notice of foreclosure letter did not meet all of the statutory requirements of O.C.G.A. § 44-14-162.2. The notice failed to indicate whether it was sent by registered or certified mail or statutory overnight delivery, and thus the court could not dismiss the borrower's wrongful foreclosure claim on this basis. Rule v. Chase Home Fin. LLC, No. (CAR), 2012 U.S. Dist. LEXIS 69699 (M.D. Ga. May 18, 2012).

Wrongful foreclosure claim was unavailing. — In a wrongful foreclosure action, the property owner did not show that a bank breached a legal duty owed to the owner with respect to providing notice under O.C.G.A. § 44-14-162.2 because the owner did not show that the bank breached a legal duty owed to the owner, the owner's wrongful foreclosure claim was unavailing. Carr v. U.S. Bank, N.A., No. 12-14535, 2013 U.S. App. LEXIS 18441 (11th Cir. Sept. 5, 2013) (Unpublished).

Trial court erred by failing to confirm sale. — Trial court erred by denying a creditor's petition to confirm the foreclosure sale of six townhouses because the sale satisfied applicable notice and advertisement requirements and the uncontradicted evidence showed that the townhouses did sell for at least fair market value. RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117 (2012).

44-14-162.3. Sales made on foreclosure under power of sale — Waiver or release of notice requirement.

No waiver or release of the notice requirement of Code Section 44-14-162.2 shall be valid when made in or contemporaneously with the security instrument containing the power of nonjudicial foreclosure sale; but, notwithstanding the requirements of Code Sections 44-14-162.1, 44-14-162.2, this Code section, and Code Section 44-14-162.4, a subsequent quitclaim deed in lieu of foreclosure shall be valid and effective as such. (Ga. L. 1981, p. 834, § 2; Ga. L. 2002, p. 415, § 44; Ga. L. 2009, p. 614, § 2/SB 141; Ga. L. 2012, p. 1079, § 1/SB 333.)

The 2009 amendment, effective July 1, 2009, deleted former subsection (b) which read: "The notice requirement of Code Section 44-14-162.2 shall apply to all nonjudicial foreclosure sales under a mortgage, security deed, or other lien contract taking place after July 1, 1981, this Code section being procedural and remedial in purpose."; and redesignated former subsection (c) as present subsection (b).

The 2012 amendment, effective July 1, 2012, deleted former subsection (a), which read: "The notice requirement of Code Section 44-14-162.2 shall apply only to the exercise of a power of sale of property all or part of which is to be used as a dwelling place by the debtor at the time the mortgage, security deed, or lien contract is entered into."; and deleted the subsection (b) designation. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1079, § 3/SB 333, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2012, and shall apply to sales made on foreclosure under power of sale executed on or after July 1, 2012."

Law reviews. — For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009). For article, "Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World: Back to the Future," see 16 (No. 4) Ga. St. B.J. 11 (2010). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

JUDICIAL DECISIONS

Cited in RBC Real Estate Fin., Inc. v. Winmark Homes, Inc., 318 Ga. App. 507, 736 S.E.2d 117 (2012).

44-14-162.4. Sales made on foreclosure under power of sale — Recitals in deeds as to meeting of notice requirement.

All deeds under power shall contain recitals setting forth the giving of notice in compliance with Code Section 44-14-162.2. The effect of such recitals shall be to protect the validity of the title of any subsequent purchaser in good faith other than the lender. (Ga. L. 1981, p. 834, § 2; Ga. L. 2012, p. 1079, § 2/SB 333.)

The 2012 amendment, effective July 1, 2012, deleted "or a statement of the facts which render the same inapplicable thereto, which facts may include, without limitation, the nonresidential character of the property" at the end of the first sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1079, § 3/SB 333, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2012, and shall apply to sales made on foreclosure under power of sale executed on or after July 1, 2012."

PART 2

FORECLOSURE ON MORTGAGES

44-14-184. Defense against foreclosure; verification.

Law reviews. — For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

44-14-187. Judgment; sale of mortgaged property.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18 Am. Jur. Pleading and Practice Forms, Mortgages, § 41.

44-14-189. Rights of purchaser at void or irregular sale.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

44-14-190. Disposition of proceeds.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

JUDICIAL DECISIONS

Damages for wrongful foreclosure. In a suit brought by a purchaser seeking damages for wrongful foreclosure of certain real property after two foreclosure sales, the trial court erred in granting the second foreclosing bank attorney fees under O.C.G.A. § 9-15-14, based on frivolous litigation since the second bank had knowledge of the purchaser's acquisition of the property via the first foreclosure, therefore, the purchaser's suit did not lack substantial justification as to the second bank and the second bank's failure to provide proper notice of the sale to the purchaser. Roylston v. Bank of Am., N.A., 290 Ga. App. 556, 660 S.E.2d 412 (2008).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 18 Am. Jur. Pleading and Practice Forms, Mortgages, § 232.

PART 3

FORECLOSURE OF DEEDS TO SECURE DEBT, PURCHASE CONTRACTS, AND BONDS FOR TITLE

44-14-210. Execution and recordation of quitclaim deed following judgment; levy and sale; disposition of proceeds; notice.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

PART 4

FORECLOSURES ON PERSONALTY

Subpart 1

In General

44-14-231. Petition for writ of possession; affidavit.

JUDICIAL DECISIONS

Res judicata and collateral estoppel did not apply. — Trial court did not err in ruling for a creditor in the creditor's action against a debtor pursuant to O.C.G.A. § 44-14-231 to foreclose on personal property and to recover monies lent and unpaid because the doctrines of res judicata and collateral estoppel did not apply when the merits of the creditor's claims for foreclosure and monies lent had not been previously adjudicated by a court of competent jurisdiction; the issue before an administrative law judge (ALJ) in the Office of State Administrative Hearings was limited to whether the Georgia Department of Revenue acted properly in cancelling the creditor's certificate of title to a vehicle, and the issue of the debtor's failure to pay the debtor's debt to the creditor was not an issue litigated and decided in the administrative proceeding. Allen v. Santana, 303 Ga. App. 844, 695 S.E.2d 314 (2010).

Cited in Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635 (2009).

44-14-232. Summons; service on defendant; debtor's duty to notify creditor of address changes; form.

JUDICIAL DECISIONS

Cited in Oduok v. Wedean Props., 319 Ga. App. 785, 738 S.E.2d 626 (2013).

44-14-233. Answer; reopening the default; granting writ upon default; trial; order to turn over property to sheriff or other.

JUDICIAL DECISIONS

Answer untimely. — In an action for an immediate writ of possession against borrowers who had defaulted, the bank's motion to dismiss the borrowers' answer and counterclaim was properly granted, because the borrowers failed to open the default judgment as a matter of right within seven days, as required by O.C.G.A. § 44-14-233(a) and, thus, the case remained in default. Mathis v. River City Bank, 317 Ga. App. 560, 731 S.E.2d 788 (2012).

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A.

§§ 44-14-234(3) and 44-14-237. Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635 (2009).

Judgment reversed when owner not accorded statutory procedures. — Trial court improperly issued the court's final judgment without affording the owner the procedures accorded the owner by O.C.G.A. § 44-14-233(c). The earlier hearing did not amount to a trial since it was neither noticed nor understood as such by the parties or the trial court, which issued a ruling only on the interlocutory matter of the registry payments at its conclusion. Ware v. Vanderbilt Mortg. & Fin., Inc., 320 Ga. App. 702, 740 S.E.2d 691 (2013).

44-14-234. Payment into court; issuance of writ; possession and disposition of property pending resolution; disposition of payments.

JUDICIAL DECISIONS

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A. §§ 44-14-234(3) and 44-14-237. Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635 (2009).

Cited in Roberts v. Windsor Credit Servs., 301 Ga. App. 393, 687 S.E.2d 647 (2009).

44-14-236. Execution and levy; retention by plaintiff; sale.

JUDICIAL DECISIONS

Cited in Hennington v. Greenpoint Mortg. Funding, Inc., No. 1:09-CV-00962-RWS, 2009 U.S. Dist. LEXIS 41343 (N.D. Ga. May 15, 2009).

44-14-237. Transfer, movement, or conveyance of property by defendant after posting of bond.

JUDICIAL DECISIONS

Defendant's failure to post bond entitled plaintiff to immediate writ of possession. — Consulting company sued a store for breach of contract; the store's debt to the company was secured by UCC financing statements on the store's inventory. The company was entitled to an immediate writ of possession because after the suit was filed, the store sold and transferred merchandise subject to the company's security interest without posting bond as required by O.C.G.A. §§ 44-14-234(3) and 44-14-237. Deere Park & Assocs. v. C H Furniture Source, LLC, 296 Ga. App. 382, 674 S.E.2d 635 (2009).

Subpart 4

Foreclosures in Magistrate Court

44-14-302. Levy and sale of property; advertisement.

When the execution provided for by Code Section 44-14-300 is delivered to a constable, he shall levy on the property wherever it may be found; and, after advertising the same for ten days preceding the sale by giving a full description of the property to be sold and the process under which he is proceeding in a written advertisement at three or more public places in the district in which the property may be found, he shall put up and expose the property for sale as provided in this Code section; provided, however, that the sale shall be had within the legal hours of sale on a regular court day and at the usual place of holding magistrate courts for the district. The constable shall put up and expose the property for sale at the time and place and in the same manner as constable's sales are required to be held. (Ga. L. 1878-79, p. 152, § 2; Ga. L. 1882-83, p. 67, § 1; Code 1882, § 3974b; Civil Code 1895, § 2761; Civil Code 1910, § 3294; Code 1933, § 67-902; Ga. L. 2003, p. 140, § 44.)

The 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, substituted "magistrate" for "justice" near the end of the first sentence.

ARTICLE 8

LIENS

Part 1

In General

44-14-320. Certain liens established; removal of nonconforming liens.

JUDICIAL DECISIONS

Priority of liens. — Judgment creditor's lien did not have priority over an assignee's security deed because the funds from the assignor's loan were used to pay off a bank's prior security deed and, thus, the assignee was able to step into the shoes of the bank, a senior creditor, as to the priority of the creditor's lien; O.C.G.A. § 44-14-320(a) only listed the liens established in Georgia without listing the liens in order of priority. Hayes v. EMC Mortg. Corp., 296 Ga. App. 709, 675 S.E.2d 594 (2009).

Interest in tort action. — Although a court had earlier rejected a debtor's reliance on O.C.G.A. § 44-12-24 in seeking a ruling that the assignment of a tort action was invalid because the debtor had assigned the future proceeds of the action, not the right of action, the assignee creditor's default allowed the court to accept the debtor's assertion that the assignment

of the proceeds to be received in the future was not a valid, enforceable assignment under Georgia law; in addition, the creditor had no lien or perfected security interest in the proceeds under O.C.G.A. § 44-14-320; thus, because there was no valid assignment and because the creditor did not have a valid, perfected security interest under Georgia law, then the creditor was an unsecured creditor with only a claim based on the debtor's breach of her promise to pay. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, 2006 Bankr. LEXIS 2614 (Bankr. N.D. Ga. June 12, 2006).

Homeowners association as judgment creditor entitled to file a lien. — Because a judgment debtor's personal property was automatically bound by a judgment as of the date a state court judgment was rendered, O.C.G.A. §§ 9-12-80 and 44-14-320(a)(2), a homeowners' association became a judgment creditor of the homeowners upon the entry of a state court judgment and was entitled to file a lien binding the homeowners' property. Laosebikan v. Lakemont Cmty. Ass'n, 302 Ga. App. 220, 690 S.E.2d 505 (2010).

Insufficient evidence to determine if there was assignment or lien. — Debtor's motion for default judgment, in an action for a declaration that the assignment of proceeds from a lawsuit to a defendant was invalid, was denied because the debtor did not assign a right of action, so O.C.G.A. § 44-12-24 did not apply, and there was no allegation that the defendant had a lien and if so, whether it was unperfected, so O.C.G.A. § 44-14-320 did not apply. Carson v. Rhodes (In re Carson), No. R04-43220-PWB, 2005 Bankr. LEXIS 2673 (Bankr. N.D. Ga. Nov. 9, 2005).

44-14-321. Lien of judgment on debt given for purchase money; priority.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

44-14-322. Vendor's equitable lien abolished.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 24A Am. Jur. Pleading and Practice Forms, Vendor and Purchaser, § 3.

44-14-323. Rank of liens according to date.

JUDICIAL DECISIONS

Application of legislative intent. — Under O.C.G.A. § 44-14-323, the legislature specifically provided that all liens, which are not regulated and fixed as to rank shall rank according to date, the oldest having priority; Georgia's appellate courts have embraced the "first in time, first in right" approach in prioritizing judgments, holding that, money in court, on a rule for its distribution, must be applied, as far as it goes, to the oldest lien that has attached to it, if there be nothing to affect the validity of the lien. Vesta Holdings I, LLC v. Tax Comm'r, 259 Ga. App. 717, 578 S.E.2d 293 (2003).

Subordination clause. — Trial court's finding with respect to the priority of a bank's security deed and the landowners' security deed was erroneous because the subordination clause in the landowners' real estate sales agreement merged into their security deed and was extinguished;

thus, the trial court was required to determine the priority of the deeds pursuant to O.C.G.A. § 44-14-323, and, as such, the landowners' deed was inferior to the bank's deed because the landowners' deed expressly stated as such and was recorded after the bank's deed. Tallahassee State Bank v. Macon, 317 Ga. App. 128, 730 S.E.2d 646 (2012).

Part 2

Landlords

44-14-340. Lien for farming supplies, equipment and other items furnished tenant; operation of law or special contract; enforcement; duty to inform; priorities.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Jury trial. — There was no right to a jury trial in an action under the Georgia Crop Lien Foreclosure Statute; a foreclosure judgment in excess of the value of the crop was void and was vacated. Bitt Int'l Co. v. Fletcher, 259 Ga. App. 406, 577 S.E.2d 276 (2003).

44-14-349. Priority of liens affecting manufactured and mobile homes.

(a) As used in this Code section, the term:

(1) "Lienholder" shall mean the holder of a perfected security interest and its assignees or servicers of the underlying debt obligation. The term shall apply only to the lienholder or an assignee or servicer of the lienholder for unpaid purchase price or first lien who has recorded such lien on the title of the manufactured home or mobile home.

(2) "Manufactured home" has the same meaning as provided in paragraph (4) of Code Section 8-2-131.

(3) "Manufactured home community" means a parcel or tract of land on which three or more manufactured homes or mobile homes are located on a continual, nonrecreational basis and offered to the public.

(4) "Mobile home" has the same meaning as provided in paragraph (6) of Code Section 8-2-131.

(b) As provided by this Code section, any lien or charge against a manufactured home or mobile home for rent upon the real property on which the manufactured home or mobile home is or has been located is subordinate to the rights of the lienholder for unpaid purchase price or

first lien, which is recorded on the title of the manufactured home or mobile home, and the assignee of such lienholder if not recorded on the title.

(c) In the event a manufactured home or mobile home has been vacant for more than 30 days and after notice to the lienholder as provided in this Code section, rent charges, as provided in this Code section, may be collected by the owner of the manufactured home community from the lienholder and the assignee of any such lienholder by an action at law as authorized by this Code section.

(d) The owner of the manufactured home community shall be entitled to collect rent charges accruing from 30 days after the lienholder receives written notice of a completed eviction of the owner or occupant of a manufactured home or mobile home by the owner of the manufactured home community or notice that a manufactured home or mobile home has been abandoned or voluntarily surrendered by the homeowner or occupant and that the manufactured home or mobile home is presently vacant and unoccupied.

(e) The notice shall state that an action for eviction has been completed against the homeowner or occupant, that the home is presently vacant and unoccupied, the amount of the daily rent charges calculated pursuant to subsection (i) of this Code section, and the date upon which the homeowner or occupant was required to make regular payments to the owner of the manufactured home community.

(f) The lienholder shall notify the owner of the manufactured home community within 30 days of receipt of the notice pursuant to subsections (d) and (e) of this Code section whether it intends to make payment of the rent charges and, if the lienholder agrees to make payment, to pay the rent charges that are due pursuant to this Code section. Thereafter, the lienholder shall pay rent charges according to the schedule of payments that the homeowner or occupant was responsible for paying through the date that the manufactured home or mobile home is removed from the owner of the manufactured home community's property. If the lienholder fails to notify the owner of the manufactured home community that it does not intend to pay the rent charges, the rent charges shall accrue and be due and owing to the property owner.

(g) In the event that the lienholder files either an action for replevin of the home or forecloses on the lien for unpaid purchase price or first lien, the lienholder shall be responsible for unpaid rent and rent charges that have accrued beginning 30 days after the eviction of the owner or occupant of the manufactured home or mobile home.

(h) In the event that the homeowner or occupant declares bankruptcy, the accruing of any rent or rent charge due by the lienholder to

the owner of the manufactured home community shall be stayed by the bankruptcy until 30 days after the final court action discharging the bankruptcy or releasing the collateral, whichever occurs first.

(i) The maximum rent charge available to the owner of a manufactured home community shall be a daily rate equal to one-thirtieth of the then current lot rental amount paid by the homeowner or occupant as defined in the current or most recent lease agreement between the homeowner or occupant and the owner of the manufactured home community. In the event that no written lease agreement is in effect between the owner of the manufactured home community and the owner or occupant of a manufactured home or mobile home, the maximum rent charge available to the owner of the manufactured home community shall be $3.00 per day.

(j) Notice required as set forth in subsections (d) and (e) of this Code section shall be mailed by certified mail, return receipt requested, or statutory overnight delivery to the registered agent of the lienholder or, if the lienholder is not a corporation, to the lienholder's last known address. Notice by certified mail shall be effective on the date of receipt or, if refused, on the date of refusal.

(k) It shall be unlawful for the owner of the manufactured home community to refuse to allow the lienholder to repossess and move the manufactured home or mobile home for failure to pay any charges for which notice was not provided in accordance with the requirements of this Code section. In the event the owner of the manufactured home community refuses to allow the lienholder to repossess and move the manufactured home or mobile home, the owner of the manufactured home community shall be liable to the lienholder for each day that the owner of the manufactured home community unlawfully maintains possession of the home, at a daily rate equal to one-thirtieth of the monthly payment due according to the contract and security agreement entered into between the homeowner or occupant and the lienholder.

(l) If either a lienholder or an owner of a manufactured home community brings an action at law against the other in a court of competent jurisdiction, the prevailing party, as determined by the court, in addition to other relief granted by the court, may be awarded costs of litigation including reasonable attorney's fees.

(m) If, after receipt of a notice pursuant to subsections (d) and (e) of this Code section, a lienholder sells or assigns a manufactured home or mobile home, the lender shall provide the purchaser of such home with a copy of the notice received from the owner of the manufactured home community and the purchaser shall take the home subject to the rights of the owner of the manufactured home community pursuant to this Code section. The owner of the manufactured home community may

enforce his or her rights for rent charges against the purchaser without issuing additional notices. (Code 1981, § 44-14-349, enacted by Ga. L. 2008, p. 946, § 1/HB 579.)

Effective date. — This Code section became effective July 1, 2008.

Part 3

Mechanics and Materialmen

44-14-360. Definitions.

As used in this part, the term:

(.1) "Business day" means any day that is not a Saturday, Sunday, or legal holiday.

(1) "Contractor" means a contractor having privity of contract with the owner of the real estate.

(2) "Land surveyor" means the same as the definition thereof in Code Section 43-15-2.

(2.1) "Lien action" means a lawsuit, proof of claim in a bankruptcy case, or a binding arbitration.

(3) "Materials," in addition to including those items for which liens are already permitted under this part, means tools, appliances, machinery, or equipment used in making improvements to the real estate, to the extent of the reasonable value or the contracted rental price, whichever is greater, of such tools, appliances, machinery, or equipment.

(4) "Materialmen" means all persons furnishing the materials, tools, appliances, machinery, or equipment included in the definition of materials in paragraph (3) of this Code section.

(5) "Professional engineer" means the same as the definition thereof in Code Section 43-15-2.

(6) "Registered forester" means the same as the definition of such term in Code Section 12-6-41.

(7) "Registered land surveyors" and "registered professional engineers" means land surveyors or professional engineers who are registered as land surveyors or professional engineers under Chapter 15 of Title 43 at the time of performing, rendering, or furnishing services protected under this part.

(8) "Residential property" means single-family and two-family, three-family, and four-family residential real estate.

(9) "Subcontractor" means, but is not limited to, subcontractors having privity of contract with the contractor. (Ga. L. 1873, p. 42, §§ 1, 7; Code 1873, §§ 1972, 1979; Code 1882, §§ 1972, 1979; Ga. L. 1893, p. 34, §§ 1, 2; Ga. L. 1895, p. 27, § 1; Civil Code 1895, §§ 2787, 2801; Ga. L. 1897, p. 30, §§ 1, 2; Ga. L. 1899, p. 33, § 1; Civil Code 1910, §§ 3329, 3336, 3352; Code 1933, §§ 67-1701, 67-2001; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 1, 2; Ga. L. 1956, p. 185, §§ 1, 5, 6, 7; Ga. L. 1956, p. 562, §§ 1, 2; Ga. L. 1978, p. 243, § 1; Ga. L. 1983, p. 1450, § 1; Ga. L. 1985, p. 1322, § 1; Ga. L. 1991, p. 915, § 1; Ga. L. 2008, p. 1063, § 1/SB 374.)

The 2008 amendment, effective March 31, 2009, added paragraphs (.1) and (2.1).

Law reviews. — For survey article on construction law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 85 (2003). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008).

JUDICIAL DECISIONS

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Supplier of equipment was supplier of material. — Under O.C.G.A. §§ 44-14-360(3) and 44-14-361.1(a), a supplier of equipment for a construction project was a supplier of material and thus had to furnish its equipment for the improvement of the project in order for its lien to arise. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290 (2008).

Mechanic's lien foreclosure action improperly dismissed. — In a mechanic's lien foreclosure action brought by a construction company against a property owner, the trial court erred by dismissing the action as untimely since the lien, although stating that the debt became due on a date more than three months from the date the lien was filed, also stated that the construction company provided services, labor, and/or materials to the property owner within three months of the filing of the complaint. D. C. Ecker Constr., Inc. v. Ponce Inv., LLC, 294 Ga. App. 833, 670 S.E.2d 526 (2008), cert. denied, No. S09C0486, 2009 Ga. LEXIS 184 (Ga. 2009).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 2.

44-14-361. Creation of liens; property to which lien attaches; items to be included in lien.

(a) The following persons shall each have a special lien on the real estate, factories, railroads, or other property for which they furnish labor, services, or materials:

(1) All mechanics of every sort who have taken no personal security for work done and material furnished in building, repairing, or improving any real estate of their employers;

(2) All contractors, all subcontractors and all materialmen furnishing material to subcontractors, and all laborers furnishing labor to subcontractors, materialmen, and persons furnishing material for the improvement of real estate;

(3) All registered architects furnishing plans, drawings, designs, or other architectural services on or with respect to any real estate;

(4) All registered foresters performing or furnishing services on or with respect to any real estate;

(5) All registered land surveyors and registered professional engineers performing or furnishing services on or with respect to any real estate;

(6) All contractors, all subcontractors and materialmen furnishing material to subcontractors, and all laborers furnishing labor for subcontractors for building factories, furnishing material for factories, or furnishing machinery for factories;

(7) All machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up any mill or other machinery in any county or who may repair the same;

(8) All contractors to build railroads; and

(9) All suppliers furnishing rental tools, appliances, machinery, or equipment for the improvement of real estate.

(b) Each special lien specified in subsection (a) of this Code section may attach to the real estate of the owner for which the labor, services, or materials are furnished if they are furnished at the instance of the owner, contractor, or some other person acting for the owner or contractor and shall include the value of work done and materials furnished in any easement or public right of way adjoining said real estate if the work done or materials furnished in the easement or public right of way is for the benefit of said real estate and is within the scope of the owner's contract for improvements to said real estate.

(c) Each special lien specified in subsection (a) of this Code section shall include the amount due and owing the lien claimant under the terms of its express or implied contract, subcontract, or purchase order subject to subsection (e) of Code Section 44-14-361.1.

(d) Each special lien specified in subsection (a) of this Code section shall include interest on the principal amount due in accordance with Code Section 7-4-2 or 7-4-16. (Ga. L. 1873, p. 42, § 7; Code 1873, § 1979; Code 1882, § 1979; Ga. L. 1893, p. 34, §§ 1, 2; Ga. L. 1895, p. 27, § 1; Civil Code 1895, § 2801; Ga. L. 1897, p. 30, §§ 1, 2; Ga. L. 1899, p. 33, § 1; Civil Code 1910, § 3352; Code 1933, § 67-2001; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 1, 2; Ga. L. 1956, p. 185, § 1; Ga. L. 1956, p. 562, § 2; Ga. L. 1982, p. 1144, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1983, p. 1450, § 1; Ga. L. 1985, p. 1322, § 2; Ga. L. 1991, p. 915, § 2; Ga. L. 2006, p. 738, § 1/SB 530; Ga. L. 2013, p. 1102, § 1/HB 434.)

The 2006 amendment, effective July 1, 2006, in subsection (b), near the beginning, inserted "of the owner", and substituted "are" for "were", near the middle of the subsection, inserted "the" following "furnished at", inserted "other", and deleted "or" preceding "contractor", and added "and shall include the value of work done and materials furnished in any easement or public right of way adjoining said real estate if the work done or materials furnished in the easement or public right of way is for the benefit of said real estate and is within the scope of the owner's contract for improvements to said real estate." at the end of the subsection.

The 2013 amendment, effective July 1, 2013, added subsections (c) and (d).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, "owner or contractor" was substituted for "owner contractor" near the middle of subsection (b).

Law reviews. — For article, "Recent Developments in Construction Law," see 5 Ga. St. B.J. 24 (1999). For survey article on construction law, see 59 Mercer L. Rev. 55 (2007). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For article, "Non-Privity Lien Rights on Private Construction Projects: The Court of Appeals of Georgia Provides Clarity," see 15 (No. 5) Ga. St. B.J. 20 (2010). For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Mechanics
Contractors and Subcontractors
Materialmen
Foreclosure

General Consideration

Supplier of supplier not entitled to lien.

A subcontractor that contracted with a construction company to supply labor and materials for the "rebranding" of service stations never had valid liens to release, cancel, or refrain from foreclosing upon; there was no evidence that the subcontractor furnished its work at the instance of the station owners or their agents, and the owners' knowledge of and consent to the work was not sufficient, standing alone, to establish the validity of the liens. Lane Supply, Inc. v. W. H. Ferguson & Sons, Inc., 286 Ga. App. 512, 649 S.E.2d 614 (2007).

General Consideration (Cont'd)

Failure to prove lien amount. — Trial court erred by granting summary judgment to a subcontractor because the subcontractor failed to prove the lien amount, if any, the subcontractor was entitled to and the subcontractor was not entitled to a lien for the attorney fees and interest allegedly owed since there was no agreement for such amounts. Hill v. VNS Corp., 329 Ga. App. 274, 764 S.E.2d 876 (2014).

Failure to state date claim became due did not render lien invalid. — Summary judgment for an owner in a supplier's suit to enforce a materialman's lien was improper because O.C.G.A. § 44-14-361.1(a)(2) tempered the principle of strict construction with respect to the form of the claim of lien, and the fact that the lien failed to state the date the supplier's claim became due did not render the lien invalid; the claim of lien complied "in substance" with the required form. Vulcan Constr. Materials, LP v. Franklin Builders Props., Inc., 298 Ga. App. 120, 679 S.E.2d 356 (2009).

Bankruptcy. — Chapter 7 Trustee was not entitled to a default judgment on a complaint to avoid a contractor's mechanics' lien under 11 U.S.C. § 547 because the facts alleged in the complaint suggested that the contractor's lien may have fallen outside the purview of 11 U.S.C. § 545; by alleging that the contractor's lien was a mechanics' lien, the trustee established the lien's nonavoidability under 11 U.S.C. § 547(c)(6). Hays v. Wellborn Forest Prods. (In re Spejcher), No. 06-62501, 2006 Bankr. LEXIS 3685 (Bankr. N.D. Ga. Oct. 30, 2006).

Mechanics

Mechanic's lien on building valid even though building owner did not own underlying real property. — Company admitted that the company held property interests in the improvements. Even if the company did not have title to the building on which the lien was claimed and title was in a third party not subject to the suit, this would not bar an action for foreclosing the statutory lien because if the company had any interest in the premises upon which the lien took effect, that interest was bound. Pinnacle Props. V, LLC v. Mainline Supply of Atlanta, LLC, 319 Ga. App. 94, 735 S.E.2d 166 (2012).

Contractors and Subcontractors

Stipulation under section did not salvage contractor's breach of contract claim. — In a breach of contract action associated with a construction project, the trial court properly granted a limited liability company's motion for a directed verdict against a contractor, as the contractor failed to present sufficient evidence linking the limited liability company to the contract sued upon, but all the evidence involved the contractor's negotiations and dealings with a businessperson and that company; further, the appeals court found that a stipulation between the parties referred only to the notice requirement of the lien statute, O.C.G.A. § 44-14-361.1(a), and instead declined to stretch the wording in the stipulation to mean more than what the parties clearly intended. L. Lowe & Co., Inc. v. Sunset Strip Props., LLC, 283 Ga. App. 357, 641 S.E.2d 797 (2007).

Subcontractor's lien had priority over lender's later-filed security deed. — Subcontractor's lien filed before a lender's security deed was superior to the deed, pursuant to O.C.G.A. § 44-2-2(b). The general contractor's affidavit that the subcontractors had been or will be paid was insufficient to satisfy the plain language of O.C.G.A. § 44-14-361.2(a), requiring a statement that payment had been made, and did not extinguish the lien. Ga. Primary Bank v. Atlanta Paving, Inc., 309 Ga. App. 851, 711 S.E.2d 409 (2011).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens

were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Materialmen

Notice adequate. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of commencement stated that it was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that it was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5, as the indexing requirements of both statutes were substantially identical. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. 2007).

Because O.C.G.A. § 44-14-361.1(a)(4) provided that where a contractor was adjudicated bankrupt or, if after an action was filed, no final judgment could be obtained against the contractor because of its adjudication in bankruptcy, the materialman was not required to file an action or obtain judgment against the contractor before enforcing a lien against the improved property; moreover, the materialman could enforce the lien directly against the property by filing an action against the owner within 12 months from the time the lien became due. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799 (2006).

Materialman's lien was void. — Subcontractor's O.C.G.A. § 44-14-361 special lien was void because the subcontractor failed to comply with the perfection requirements in O.C.G.A. § 44-14-361.5(a), (c); the fact that the general contractor on a construction project had failed to post a notice of commencement at the construction site did not absolve the subcontractor from complying with the perfection requirements. Rey Coliman Contrs., Inc. v. PCL Constr. Servs., 296 Ga. App. 892, 676 S.E.2d 298 (2009).

Foreclosure

Foreclosure of surety bond unavailable for off-site work. — Although sewer work was required by a city for the completion of a subdivision, a subcontractor's off-site work was not an "improvement to the property" pursuant to O.C.G.A. § 44-14-361; consequently, the trial court properly granted summary judgment to the surety in the subcontractor's action to foreclose on a bond. Trench Shoring Servs. of Atlanta, Inc. v. Westchester Fire Ins. Co., 274 Ga. App. 850, 619 S.E.2d 361 (2005).

44-14-361.1. How liens declared and created; amendment; record; commencement of action; notice; priorities; parties; limitation on aggregate amount of liens.

(a) To make good the liens specified in paragraphs (1) through (8) of subsection (a) of Code Section 44-14-361, they must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective or enforceable:

(1) A substantial compliance by the party claiming the lien with his or her contract for building, repairing, or improving; for architectural services furnished; for registered forester services furnished or

performed; for registered land surveying or registered professional engineering services furnished or performed; or for materials or machinery furnished or set up;

(2) The filing for record of his or her claim of lien within 90 days after the completion of the work, the furnishing of the architectural services, or the furnishing or performing of such surveying or engineering services or within 90 days after the material or machinery is furnished in the office of the clerk of the superior court of the county where the property is located. The lien shall include a statement regarding its expiration pursuant to Code Section 44-14-367 and a notice to the owner of the property on which a claim of lien is filed that such owner has the right to contest the lien; the absence of such statement or notice shall invalidate the lien. The claim shall be in substance as follows:

"A.B., a mechanic, contractor, subcontractor, materialman, machinist, manufacturer, registered architect, registered forester, registered land surveyor, registered professional engineer, or other person (as the case may be) claims a lien in the amount of (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services, or materials were supplied to the premises) for building, repairing, improving, or furnishing material (or whatever the claim may be)."

No later than two business days after the date the claim of lien is filed of record, the lien claimant shall send a true and accurate copy of the claim of lien by registered or certified mail or statutory overnight delivery to the owner of the property or, if the owner's address cannot be found, the contractor, as the agent of the owner; provided, however, if the property owner is an entity on file with the Secretary of State's Corporations Division, sending a copy of the claim of lien to the entity's address or the registered agent's address shall satisfy this requirement. In all cases in which a notice of commencement is filed with the clerk of the superior court pursuant to subsection (b) of Code Section 44-14-361.5, a lien claimant shall also send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the contractor at the address shown on the notice of commencement;

(3) The commencement of a lien action for the recovery of the amount of the party's claim within 365 days from the date of filing for record of his or her claim of lien. In addition, within 30 days after commencing such lien action, the party claiming the lien shall file a

notice with the clerk of the superior court of the county wherein the subject lien was filed. The notice shall contain a caption referring to the then owner of the property against which the lien was filed and referring to a deed or other recorded instrument in the chain of title of the affected property. The notice shall be executed, under oath, by the party claiming the lien or by such party's attorney of record, but failure to execute the notice under oath shall be an amendable defect which may be cured by the party claiming the lien or by such party's attorney without leave of court at any time before entry of the pretrial order and thereafter by leave of court. An amendment of notice pursuant to this Code section shall relate back to the date of filing of the notice. The notice shall identify the court or arbitration venue wherein the lien action is brought; the style and number, if any, of the lien action, including the names of all parties thereto; the date of the filing of the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which liens specified in Code Section 44-14-361 are filed. The clerk of the superior court shall enter on the subject lien so referred to the book and page on which the notice is recorded and shall index such notice in the name of the then purported owner as shown by the caption contained in such notice. A separate lis pendens notice need not be filed with the commencement of this action; and

(4) In the event any contractor or subcontractor procuring material, architect's services, registered forester's services, registered land surveyor's services, or registered professional engineer's services, labor, or supplies for the building, repairing, or improving of any real estate, building, or other structure shall abscond or die or leave the state during the required time period for filing a lien action, so that personal jurisdiction cannot be obtained on the contractor or subcontractor in a lien action for the services, material, labor, or supplies, or if the contractor or subcontractor shall be adjudicated a bankrupt, or if, after the filing of a lien action, no final judgment can be obtained against him or her for the value of such material, services, labor, or supplies because of his or her death, adjudication in bankruptcy, or the contract between the party claiming the lien and the contractor or subcontractor includes a provision preventing payment to the claimant until after the contractor or the subcontractor has received payment, then and in any of these events, the person or persons furnishing material, services, labor, and supplies shall be relieved of the necessity of filing a lien action or obtaining judgment against the contractor or subcontractor as a prerequisite to enforcing a lien against the property improved by the contractor or subcontractor. Subject to Code Section 44-14-361, the person or persons furnishing material, services, labor, and supplies may enforce the lien directly against the property so improved in a lien action against the owner

thereof, if filed within the required time period for filing a lien action, with the judgment rendered in any such proceeding to be limited to a judgment in rem against the property improved and to impose no personal liability upon the owner of the property; provided, however, that in such lien action for recovery, the owner of the real estate improved, who has paid the agreed price or any part of same, may set up the payment in any lien action brought and prove by competent and relevant evidence that the payments were applied as provided by law, and no judgment shall be rendered against the property improved. Within 30 days after filing such lien action, the party claiming the lien shall file a notice with the clerk of the superior court of the county wherein the subject lien was filed. The notice shall contain a caption referring to the then owner of the property against which the lien was filed and referring to a deed or other recorded instrument in the chain of title of the affected property. The notice shall be executed, under oath, by the party claiming the lien or by his or her attorney of record. The notice shall identify the court or arbitration venue wherein the lien action is brought; the style and number of the lien action, if any, including the names of all parties thereto; the date of the filing of the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which liens specified in Code Section 44-14-361 are filed. The clerk of the superior court shall enter on the subject lien so referred to the book and page on which the notice is recorded and shall index such notice in the name of the then purported owner as shown by the caption contained in such notice. A separate lis pendens notice need not be filed with the commencement of this action.

(a.1) A claim of lien may be amended at any time to reduce the amount claimed, and such amended claim of lien shall relate back to the date of filing for record of the original claim of lien. An amended claim of lien filed for record pursuant to this subsection shall be in substance as follows:

"That certain claim of lien filed by A.B. against property of C.D. on (date) and recorded at book (book#), page (page#) in the lien index of (name of county) County is hereby amended by reducing the amount of such claim of lien to (specify reduced amount claimed). The remaining terms of such original claim of lien are hereby incorporated by reference into this amended claim of lien. This amended claim of lien relates back to the date that such original claim of lien was filed for record."

and shall be sent to the owner of the property in the same manner as required for a claim of lien in paragraph (2) of subsection (a) of this Code section.

(b) As between themselves, the liens provided for in Code Section 44-14-361 shall rank according to the date filed; but all of the liens mentioned in this Code section for repairs, building, or furnishing materials or services, upon the same property, shall, as to each other, be of the same date when declared and filed for record within 90 days after the work is done or before that time.

(c) The liens specified in Code Section 44-14-361 shall be inferior to liens for taxes, to the general and special liens of laborers, to the general lien of landlords of rent when a distress warrant is issued out and levied, to claims for purchase money due persons who have only given bonds for titles, and to other general liens when actual notice of the general lien of landlords and others has been communicated before the work was done or materials or services furnished; but the liens provided for in Code Section 44-14-361 shall be superior to all other liens not excepted by this subsection.

(d) In any proceeding brought by any materialman, by any mechanic, by any laborer, by any subcontractor, or by any mechanic of any sort employed by any subcontractor or by any materialmen furnishing material to any subcontractor, or by any laborer furnishing labor to any subcontractor, to enforce such a lien, the contractor having a direct contractual relationship with the subcontractor shall not be a necessary party; but he or she may be made a party. In any proceedings brought by any mechanic employed by any subcontractor, by any materialmen furnishing material to any subcontractor, or by any laborer furnishing labor to any subcontractor, the subcontractor shall not be a necessary party; but he or she may be made a party. The contractor or subcontractor or both may intervene in the proceedings at any time before judgment for the purpose of resisting the establishment of the lien or of asserting against the lienor any claim of the contractor or subcontractor growing out of or related to the transaction upon which the asserted lien is based.

(e) In no event shall the aggregate amount of liens set up by Code Section 44-14-361 exceed the contract price of the improvements made or services performed.

(f) The filing fees for a claim of materialman's or mechanic's lien and any related document created pursuant to this Code section, including but not limited to a notice of commencement of action, shall be the amount set by Code Section 15-6-77 for liens on real estate and personal property. (Ga. L. 1873, p. 42, § 7; Code 1873, § 1980; Ga. L. 1874, p. 45, § 1; Code 1882, § 1980; Civil Code 1895, § 2804; Civil Code 1910, § 3353; Code 1933, § 67-2002; Ga. L. 1941, p. 345, § 1; Ga. L. 1952, p. 291, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 582, §§ 3-5; Ga. L. 1956, p. 185, §§ 2, 3; Ga. L. 1956, p. 562, § 3; Ga. L. 1960, p. 103, § 1; Ga. L. 1967, p. 456, § 1; Ga. L. 1968, p. 317, § 1; Ga. L. 1977, p. 675, § 1; Ga.

L. 1981, p. 846, § 1; Code 1981, § 44-14-362; Code 1981, § 44-14-361.1, enacted by Ga. L. 1983, p. 1450, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 1322, § 3; Ga. L. 1989, p. 438, § 1; Ga. L. 1991, p. 639, § 1; Ga. L. 1997, p. 829, § 1; Ga. L. 1998, p. 860, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 1063, § 2/SB 374; Ga. L. 2010, p. 859, § 1/SB 362.)

The 2008 amendment, effective March 31, 2009, rewrote this Code section.

The 2010 amendment, effective July 1, 2010, added subsection (a.1).

Law reviews. — For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration
Compliance
Filing of Claims
Commencement of Action
Insolvency, Absconding, etc., of Contractor or Subcontractor
Foreclosure Proceedings

General Consideration

Failure to prove lien amount. — Trial court erred by granting summary judgment to a subcontractor because the subcontractor failed to prove the lien amount, if any, the subcontractor was entitled to and the subcontractor was not entitled to a lien for the attorney fees and interest allegedly owed since there was no agreement for such amounts. Hill v. VNS Corp., 329 Ga. App. 274, 764 S.E.2d 876 (2014).

Failure to file lien notice. — Homeowner was entitled to summary judgment on the contractor's claim for foreclosure of a lien because the contractor failed to file the notice required by O.C.G.A. § 44-14-361.1(a)(3). Wagner v. Robinson, 329 Ga. App. 169, 764 S.E.2d 189 (2014).

A lien is not a pleading for purposes of O.C.G.A. § 51-5-8 and statements made within a surveyor's lien are not afforded absolute privilege until the lien becomes attached to a lawsuit and verified notice of the suit is filed under O.C.G.A. § 44-14-361.1, at which point, the lien becomes an act of legal, or judicial process, and achieves the formality, solemnity, and status of a sworn statement. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Subcontractor not eligible for lien. — Because a subcontractor did not actually comply with O.C.G.A. § 43-14-8(f) as the evidence indicated that a Georgia-licensed electrician that the subcontractor affiliated itself with through an alleged joint venture only presented electrical contracting licenses when permits for the work were applied for and took no action to inspect others' electrical work or to verify that the work complied with the applicable codes, the subcontractor could not enforce the subcontract with the contractor, could not recover in quantum meruit under O.C.G.A. § 9-2-7 as the express contract violated public policy, and could not file a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224 (2008).

Applicability to supplier of equipment. — Under O.C.G.A. §§ 44-14-360(3) and 44-14-361.1(a), a supplier of equipment for a construction project was a supplier of material and thus had to furnish its equipment for the improvement of the project in order for its lien to arise. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290 (2008).

Cited in GF/Legacy Dallas, Inc. v. Juneau Constr. Co., LLC, 282 Ga. App. 14, 637 S.E.2d 511 (2006); Consumer Portfolio Servs. v. Rouse, 282 Ga. App. 314, 638 S.E.2d 442 (2006); L. Lowe & Co., Inc. v. Sunset Strip Props., LLC, 283 Ga. App. 357, 641 S.E.2d 797 (2007); LandSouth Constr., LLC v. Lake Shadow Ltd., LLC., 303 Ga. App. 413, 693 S.E.2d 608 (2010); Sun Nurseries, Inc. v. Lake Erma, LLC, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

Compliance

Affidavit. — Trial court did not err by granting partial summary judgment to a buyer on its claim that the seller's mechanic's lien was invalid for failure to record an affidavit for the commencement of an action so as to establish the lien as required by O.C.G.A. § 44-14-361.1(a)(3). Krut v. Whitecap Hous. Group, LLC, 268 Ga. App. 436, 602 S.E.2d 201 (2004).

Description of property.

Home purchasers and a mortgagee were entitled to summary judgment on a contractor's materialmen's liens because the property descriptions in each of the liens did not accurately describe the purchasers' property as they differed from the description in the warranty and security deeds and, thus, the liens did not comply O.C.G.A. § 44-14-361.1(a). Bollers v. Noir Enters., 297 Ga. App. 435, 677 S.E.2d 338 (2009).

Compliance with copy requirement. — Trial court did not err in granting a subcontractor summary judgment in the subcontractor's action against a property owner and surety to recover under a lien discharge bond for monies allegedly owed for materials, services, and labor the subcontractor supplied to a construction project because the subcontractor complied with the copy requirement of O.C.G.A. § 44-14-361.1(a)(2); the subcontractor's claim of lien was not ineffective by reason of the slight variance to be found in the copy supplied to the owner because the copy of the claim of lien the subcontractor sent to the owner clearly served the purpose of the claim of lien provisions found in § 44-14-361.1(a)(2) of ensuring that the owner timely received notice of its lien, even though one word of the owner's name was omitted. Madison Retail Suwanee, LLC v. Orion Enters. Sales & Serv., 309 Ga. App. 712, 711 S.E.2d 71 (2011).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Subcontractor satisfied requirements and did not refer to owners as contractors. — Dismissal of the petitions was affirmed because the subcontractor's claims of liens included statements that the liens were against specific properties for materials furnished to the respective property owner or owners, and at no point in the claims of liens did the subcontractor describe the owners as contractors. Robertson v. Ridge Envtl., LLC, 319 Ga. App. 570, 737 S.E.2d 578 (2013).

Filing of Claims

Failure to meet filing requirement.

When a Chapter 7 debtor raised two counterclaims to a nondischargeability complaint that both involved state law issues (breach of contract and whether the creditor failed to timely file a notice of action under O.C.G.A. § 44-14-361.1(a)(3) and (4)), a bankruptcy court determined sua sponte that discretionary abstention under 28 U.S.C. § 1334(c)(1) was appropriate. While dischargeability was a bankruptcy matter, the state law liability issues were not so closely related that the dischargeability issue could not be severed, and it was in the best interest of the parties that the debtor's liability under state law be determined in a pending state court lien action. K.A.P., Inc. v. Hardigan (In re Hardigan), No. 12-4069, 2013 Bankr. LEXIS 277 (Bankr. S.D. Ga. Jan. 18, 2013).

Commencement of Action

Filing of notice prerequisite to enforceability of lien.

Because a notice under O.C.G.A. § 44-14-361.1(a)(3) was not filed within 14 days of a lien claimant's suit being initiated, the lien was unenforceable, and the trial court did not err in granting a developer's motion for partial summary judgment against the lien claimant; while the appeals court sympathized with the lien claimant's argument that the claimant received a file-stamped copy and as a result believed no fee was due, ultimately it was the responsibility of plaintiff and plaintiff's counsel to see that the appropriate fees were paid in a timely manner. Kendall Supply, Inc. v. Pearson Cmtys., Inc., 285 Ga. App. 863, 648 S.E.2d 158 (2007).

When a subcontractor filed a proof of claim in a general contractor's bankruptcy action, but did not file a notice of commencement of the action as required by O.C.G.A. § 44-14-361.1(a)(3), the subcontractor's lien claim was extinguished and could not be revived in an action by the subcontractor against the property owner. Action Concrete v. Portrait Homes - Little Suwanee Point, LLC, 285 Ga. App. 650, 647 S.E.2d 353 (2007).

Materialmen's lien creditor was required to file a notice of commencement within 14 days of filing the creditor's proof of claim under O.C.G.A. § 44-14-361.1(a)(3), and the creditor's failure to do so rendered the creditor's claim unperfected under 11 U.S.C. § 546(b)(2), and unsecured, so that the creditor's lien could be avoided under 11 U.S.C. § 545(2). In re R & B Constr., No. 08-62029), 2010 Bankr. LEXIS 2546 (Bankr. N.D. Ga. Aug. 17, 2010).

Facsimile not effective as notice. — Trial court properly granted summary judgment to property owner after the subcontractor sued the property owner so that the subcontractor could perfect its materialman's lien against the property owner's property, as the subcontractor's method of providing notice of the lien to the property owner did not comply with applicable statutory law, O.C.G.A. § 44-14-361.1(a)(2), since that statute expressly allowed the lien notice to be provided to the property owner by registered mail, certified mail, or statutory overnight delivery, and not though the facsimile transmission that the subcontractor used, especially since the facsimile transmission was not the equivalent method of providing notice as those methods set forth in the statute. Phillips, Inc. v. Historic Props. of Am., 260 Ga. App. 886, 581 S.E.2d 389 (2003).

Three months meant three calendar months, not 90 days. — The 1991 version of O.C.G.A. § 44-14-361.1, requiring a contractor to file the contractor's claim of lien three months from the completion of the work, governed and was satisfied by the contractor's filing the claim of lien on September 12 following the completion of work on June 13. The court rejected the owner's argument that "three months" meant 90 days. Fed. Trust Bank v. C. W. Matthews Contr. Co., 312 Ga. App. 200, 718 S.E.2d 63 (2011).

Creditor's time for action tolled under bankruptcy provisions. — Bankruptcy court held that the procedure under O.C.G.A. § 44-14-361.1 to "make good" a mechanic's or materialman's lien involved creating the lien, not mere perfection, and these acts were subject to an automatic stay; accordingly, because the automatic stay prevented the creditor from complying with O.C.G.A. § 44-14-361.1, the creditor's failure to take further action under that statute was tolled under 11 U.S.C. § 108. In re Durango Ga. Paper Co., 297 B.R. 316 (Bankr. S.D. Ga. 2003).

Creditor's action not tolled under bankruptcy provisions. — Chapter 11 trustee could avoid a creditor's mechanic's lien pursuant to 11 U.S.C. § 545(2) because the requirements of the Georgia Lien Statute, O.C.G.A. § 44-14-360 et seq., were acts of perfecting rather than creating or enforcing a lien and, therefore, 11 U.S.C. § 108(c)(2) did not toll creditor's obligation to timely comply with the statute; the creditor's failure to comply with the Georgia Lien Statute's requirements within the statute's time limits and receive the protection of relation back perfection under 11 U.S.C. § 546(b) permitted the trustee to avoid the lien under 11 U.S.C. § 545(2). Durango Ga. Paper Co. v.

Milton J. Wood Fire Prot., Inc. (In re Durango Ga. Paper Co.), 356 B.R. 305 (Bankr. S.D. Ga. 2005).

Determination of when claims become due. — The "due date" for purposes of O.C.G.A. § 44-14-361.1(a)(3) does not include an inspection period, but is determined from the last date the equipment was provided for the improvement of the real estate. In accordance with the mandate that Georgia's materialmen's lien law should be dealt with according to the strictest rules of strict construction, the three month period contemplated by O.C.G.A. § 44-14-361.1(a)(2) commences on the last date materials are furnished; there is no reason to treat the calculation of the 12-month period contemplated by O.C.G.A. § 44-14-361(a)(3) differently. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290 (2008).

In a mechanic's lien foreclosure action brought by a construction company against a property owner, the trial court erred by dismissing the action as untimely since the lien, although stating that the debt became due on a date more than three months from the date the lien was filed, also stated that the construction company provided services, labor, and/or materials to the property owner within three months of the filing of the complaint. D. C. Ecker Constr., Inc. v. Ponce Inv., LLC, 294 Ga. App. 833, 670 S.E.2d 526 (2008), cert. denied, No. S09C0486, 2009 Ga. LEXIS 184 (Ga. 2009).

Failure to state date claim became due did not render lien invalid. — Summary judgment for an owner in a supplier's suit to enforce a materialman's lien was improper because O.C.G.A. § 44-14-361.1(a)(2) tempered the principle of strict construction with respect to the form of the claim of lien, and the fact that the lien failed to state the date the supplier's claim became due did not render the lien invalid; the claim of lien complied "in substance" with the required form. Vulcan Constr. Materials, LP v. Franklin Builders Props., Inc., 298 Ga. App. 120, 679 S.E.2d 356 (2009).

Materialman's allegedly inadequate notice. — Trial court properly granted summary judgment to the materialman on its action to recover on a lien release bond after an electrical subcontractor did not pay for materials supplied to it by the materialman, and despite the claim of the general contractor and the surety that the materialman did not comply with a lien statute notice requirement; the lien statute notice requirement was meant to protect prospective purchasers from unknowingly buying property encumbered by liens and did not apply to the materialman's situation because the materialman, acting as a lien claimant, was attempting to recover on a lien discharge bond that the general contractor and the surety had filed to discharge the lien against the electrical contractor. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99 (2004).

Action untimely filed. — A supplier of equipment had not brought its claim against a contractor within 12 months of when the claim became due, as required by O.C.G.A. § 44-14-361.1(a)(3); the 12-month period did not include a period for the inspection of the returned equipment, but was determined from the last date the equipment was furnished for the improvement of the real estate. Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290 (2008).

Concurrent action. — Subcontractor did not fail to comply with the lien statute in filing a concurrent action against a general contractor on the underlying contract and against the property owner and the surety on the discharge bond because the concurrent action filed by the subcontractor against the general contractor, the owner, and the surety was permitted by the decision of the court of appeals in a prior case; in that case, the court of appeals determined that the subcontractor's action against the general contractor and its action against the owner to enforce the lien could be brought concurrently and could be combined in the same petition. Madison Retail Suwanee, LLC v. Orion Enters. Sales & Serv., 309 Ga. App. 712, 711 S.E.2d 71 (2011).

Insolvency, Absconding, etc., of Contractor or Subcontractor

Notice in action against property owner.

Because O.C.G.A. § 44-14-361.1(a)(4) provided that where a contractor was adjudicated bankrupt or, if after an action was filed, no final judgment could be obtained against the contractor because of its adjudication in bankruptcy, the materialman was not required to file an action or obtain judgment against the contractor before enforcing a lien against the improved property; moreover, the materialman could enforce the lien directly against the property by filing an action against the owner within 12 months from the time the lien became due. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799 (2006).

Foreclosure Proceedings

Procedural error made error in lien draft irrelevant. — An attorney was properly granted summary judgment in a legal malpractice suit as to an issue of whether the attorney inadequately drafted a lien as the lien foreclosure action was filed by another attorney, who failed to comply with the notice requirement of O.C.G.A. § 44-14-361.1(a), which made the adequacy of the legal description in the lien irrelevant due to that procedural error. Bonner Roofing & Sheet Metal Co. v. Karsman, 285 Ga. App. 586, 646 S.E.2d 763 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 97.

44-14-361.2. Dissolution of lien.

Law reviews. — For annual survey on construction law, see 64 Mercer L. Rev. 71 (2012).

JUDICIAL DECISIONS

After reviewing the affidavit, the court determined that in the absence of any evidence of collusion, fraud, or actual knowledge of any irregularity by the acceptance corporation, the affidavit of debtor's principal was sufficient to dissolve the inchoate materialmans' liens. Under the circumstances, the affidavit signed by debtor's principal was valid and enforceable against two creditors; thus, the acceptance corporation's lien was entitled to first priority status. RWD Real Estate, LLC v. Nissan Motor Acceptance Corp. (In re RWD Real Estate, LLC), No. 09-41061, 2010 Bankr. LEXIS 1896 (Bankr. M.D. Ga. May 24, 2010).

Inadequate statement of payment. — Subcontractor's lien filed before a lender's security deed was superior to the deed pursuant to O.C.G.A. § 44-2-2(b). The general contractor's affidavit that the subcontractors had been or will be paid was insufficient to satisfy the plain language of O.C.G.A. § 44-14-361.2(a), requiring a statement that payment had been made, and did not extinguish the lien. Ga. Primary Bank v. Atlanta Paving, Inc., 309 Ga. App. 851, 711 S.E.2d 409 (2011).

Bankruptcy court denied a motion filed by a paving company and an electric company, pursuant to Fed. R. Bankr. P. 9023 and 9024 and Fed. R. Civ. P. 59 and 60, which asked the court to alter, amend, and reconsider an order which found that a lien an acceptance corporation held on real property a Chapter 11 debtor owned was entitled under O.C.G.A. § 44-14-361.2(a) to first priority status. The paving company and the electric company were not entitled to relief under Fed.

R. Civ. P. 60 because the companies had not presented evidence that the acceptance corporation engaged in misconduct, misrepresentation, or fraud, and the court refused to grant relief under Fed. R. Civ. P. 59(e) because the paving company and the electric company failed in the first hearing to recognize the significance of an affidavit executed by the debtor's owner in conjunction with a loan the debtor obtained from the acceptance corporation, which falsely stated that no work had been done on the property within 90 days of closing. RWD Real Estate, LLC v. Nissan Motor Acceptance Corp. (In re RWD Real Estate, LLC), No. 09-41061, 2010 Bankr. LEXIS 2420 (Bankr. M.D. Ga. July 23, 2010).

44-14-361.5. Liens of persons without privity of contract.

(a) To make good the liens specified in paragraphs (1), (2), and (6) through (9) of subsection (a) of Code Section 44-14-361, any person having a right to a lien who does not have privity of contract with the contractor and is providing labor, services, or materials for the improvement of property shall, within 30 days from the filing of the notice of commencement or 30 days following the first delivery of labor, services, or materials to the property, whichever is later, give a written notice to contractor as set out in subsection (c) of this Code section to the owner or the agent of the owner and to the contractor for a project on which there has been filed with the clerk of the superior court a notice of commencement setting forth therein the information required in subsection (b) of this Code section.

(b) Not later than 15 days after the contractor physically commences work on the property, a notice of commencement shall be filed by the owner, the agent of the owner, or by the contractor with the clerk of the superior court in the county in which the project is located. A copy of the notice of commencement shall be posted on the project site. The notice of commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the project being constructed and the legal description of the property upon which the improvements are being made;

(3) The name and address of the true owner of the property;

(4) The name and address of the person other than the owner at whose instance the improvements are being made, if not the true owner of the property;

(5) The name and the address of the surety for the performance and payment bonds, if any; and

(6) The name and address of the construction lender, if any.

The contractor shall be required to give a copy of the notice of commencement to any subcontractor, materialman, or person who

makes a written request of the contractor. Failure to give a copy of the notice of commencement within ten calendar days of receipt of the written request from the subcontractor, materialman, or person shall render the provision of this Code section inapplicable to the subcontractor, materialman, or person making the request.

(c) A notice to contractor shall be sent by registered or certified mail or statutory overnight delivery to the owner or the agent of the owner and to the contractor at the addresses set forth in the notice of commencement setting forth:

(1) The name, address, and telephone number of the person providing labor, services, or materials;

(2) The name and address of each person at whose instance the labor, services, or materials are being furnished;

(3) The name of the project and location of the project set forth in the notice of commencement; and

(4) A description of the labor, services, or materials being provided and, if known, the contract price or anticipated value of the labor, services, or materials to be provided or the amount claimed to be due, if any.

(d) The failure to file a notice of commencement shall render the provisions of this Code section inapplicable. The filing of a notice of commencement shall not constitute a cloud, lien, or encumbrance upon or defect to the title of the real property described in the notice of commencement, nor shall it alter the aggregate amounts of liens allowable, nor shall it affect the priority of any loan in which the property is to secure payment of the loan filed before or after the notice of commencement, nor shall it affect the future advances under any such loan. Nothing contained in this Code section shall affect the provisions of Code Section 44-14-361.2.

(e) The clerk of each superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the true owner and the contractor as contained in the notice of commencement. (Code 1981, § 44-14-361.5, enacted by Ga. L. 1993, p. 1008, § 1; Ga. L. 1995, p. 672, § 1; Ga. L. 2008, p. 1063, § 3/SB 374; Ga. L. 2013, p. 141, § 44/HB 79; Ga. L. 2014, p. 866, § 44/SB 340.)

The 2008 amendment, effective March 31, 2009, in subsection (c), substituted "sent by registered or certified mail or statutory overnight delivery" for "given" in the introductory paragraph, and revised capitalization throughout the subsection.

The 2013 amendment, effective April

24, 2013, part of an Act to revise, modernize, and correct the Code, revised capitalization throughout this Code section.

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, revised capitalization in subsection (a).

Law reviews. — For survey article on construction law, see 59 Mercer L. Rev. 55 (2007). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey on construction law, see 61 Mercer L. Rev. 65 (2009). For article, "Non-Privity Lien Rights on Private Construction Projects: The Court of Appeals of Georgia Provides Clarity," see 15 (No. 5) Ga. State Bar J. 20 (2010). For annual survey on construction law, see 64 Mercer L. Rev. 71 (2012).

JUDICIAL DECISIONS

Notice not required when filing lien. — A Notice of Commencement that failed to identify the true owner of the property upon which improvements were being made and failed to include a legal description of the property was fatally deficient, and therefore, under O.C.G.A § 14-44-361.5(d), a sub-subcontractor that provided labor services to the project was relieved of the obligations regarding Notice to Contractor outlined in § 14-44-361.5(a), (c) when filing a materialman's lien. Harris Ventures, Inc. v. Mallory & Evans, Inc., 291 Ga. App. 843, 662 S.E.2d 874 (2008), cert. denied, 2008 Ga. LEXIS 790 (Ga. 2008).

Time requirement for filing notice of commencement. — O.C.G.A. § 44-14-361.5(a) and (d) do not require the filing of a Notice of Commencement within the 15-day deadline as a general condition to providing a Notice to Contractor. The failure to file a Notice of Commencement as provided in § 44-14-361.5(d) applies when there has been a total failure to file a Notice of Commencement at the time when a materialman must give a written Notice to Contractor to perfect its lien under § 44-14-361.5(a). Beacon Med. Prods. v. Travelers Cas. & Sur. Co., 292 Ga. App. 617, 665 S.E.2d 710 (2008).

Filing of notice to contractor. — A supplier was not entitled to recover on a materialman's lien discharge bond because it had not perfected the lien by filing a Notice to Contractor under O.C.G.A. § 44-14-361.5(a). The fact that the general contractor did not file its Notice of Commencement within 15 days did not relieve the supplier of its duty to file the Notice to Contractor; moreover, because the supplier did have record notice of the Notice of Commencement, which was filed nearly four months before the supplier first provided materials for the project, the purpose of the statute was satisfied. Beacon Med. Prods. v. Travelers Cas. & Sur. Co., 292 Ga. App. 617, 665 S.E.2d 710 (2008).

Supplier to a subcontractor on a construction project was not entitled to recover on a materialman's lien under O.C.G.A. § 44-14-361.5 because the supplier failed to file a Notice to Contractor as required. The contractor's late filing of the Notice of Commencement did not relieve the supplier of the supplier's duty to provide notice. Southeast Culvert, Inc v. Hardin Bros., LLC, 312 Ga. App. 158, 718 S.E.2d 28 (2011), cert. denied, 2012 Ga. LEXIS 233 (Ga. 2012).

Notice to contractor deficient. — Trial court did not err in granting a general contractor and the contractor's surety summary judgment in a supplier's action to recover under a payment bond and a lien discharge bond for monies a subcontractor owed the contractor for materials it supplied to a construction project because the supplier's notice to the contractor failed to comply with O.C.G.A. §§ 10-7-31(a) and 44-14-361.5(c) because the notice wholly omitted required information; although the supplier's notice to the contractor set forth the subcontractor's name, it failed to provide any address for the subcontractor as required under §§ 10-7-31(a)(2) and 44-14-361.5(c)(2), and although the notice set forth the name of the project, the notice failed to state the location of the construction project pursuant to §§ 10-7-31(a)(3) and 44-14-361.5(c)(3). Consol. Pipe & Supply

Co. v. Genoa Constr. Servs., 302 Ga. App. 255, 690 S.E.2d 894 (2010).

Substantial compliance with notice of commencement. — As a general contractor's notice of commencement under O.C.G.A. § 44-14-361.5(b) substantially complied when the contractor's notice only omitted the contractor's telephone number, a supplier still had a duty to file a notice to the contractor under § 44-14-361.5(a) and (c); accordingly, summary judgment to the supplier was error on the supplier's lien-discharge bond claim as the supplier had failed to file the notice with the contractor. Fid. & Deposit Co. v. Lafarge Bldg. Materials, Inc., 312 Ga. App. 821, 720 S.E.2d 288 (2011).

Failure to post notice of commencement at job site. — General contractor's failure to post a notice of commencement at a job site as required by O.C.G.A. § 44-14-365.1(b) did not absolve a subcontractor from compliance with the special lien perfection requirements in § 44-14-361.5(a), (c); while the statute specifically stated that a failure to file a notice of commencement with the clerk of the superior court where a construction project was located would result in a subcontractor not having to comply with § 44-14-361.5(a), (c), no such language was included in the statute regarding the failure to post a notice of commencement at a job site. Rey Coliman Contrs., Inc. v. PCL Constr. Servs., 296 Ga. App. 892, 676 S.E.2d 298 (2009).

Judgment on the pleadings reversed. — Construing the pleadings in a light most favorable to showing a question of fact, in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in its action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that its "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and its surety were not entitled to judgment on the pleadings. Consol. Pipe & Supply Co. v. Genoa Constr. Servs., Inc., 279 Ga. App. 894, 633 S.E.2d 59 (2006).

Owner as "contractor." — There was no reason why an owner could not also have been a contractor for purposes of a materialman's lien; because a property owner listed itself as "general contractor" in its notices of commencement, and because a materials supplier was not in privity with the owner, the supplier was required to provide the owner with the O.C.G.A. § 44-14-361(a) notice to contractor; since the supplier failed to give the proper notice, its materialman's liens were invalid. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Indexing requirements. — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of commencement stated that it was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that it was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5, as the indexing requirements of both statutes were substantially identical. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. 2007).

Notice of commencement defective. — A contractor's notice of commencement that described the property by street address only, without a legal description, and that did not list the name of the property's true owner, but the name under

which the owner did business, was fatally defective under O.C.G.A. § 44-14-361.5, thus relieving a lien claimant of the duty to file a notice to contractor. GE v. North Point Ministries, Inc., 289 Ga. App. 382, 657 S.E.2d 297 (2008).

The requirement to furnish a legal description of the property and the name of the true owner are matters of substance, not mere technicalities, and providing merely the property's street address and an "a/k/a" name for the owner amounts to neither actual nor substantial compliance with the provisions of O.C.G.A. § 44-14-361.5. Either of these defects on the face of a notice of commencement will render the notice insufficient to trigger the provisions of O.C.G.A. § 44-14-361.5, so that a lien claimant is relieved of the obligation to provide a notice to contractor in order to preserve its lien. GE v. North Point Ministries, Inc., 289 Ga. App. 382, 657 S.E.2d 297 (2008).

44-14-362. Cancellation of preliminary notice upon final payment; form of cancellation.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17B Am. Jur. Pleading and Practice Forms, Mechanics' Liens, § 31.

44-14-363. Special liens on personalty; notice; enforcement; priorities; maximum claims for storage; recordation.

(a) All mechanics of every sort shall have a special lien on personal property for work done and material furnished in manufacturing or repairing the personal property and for storage of the personal property after its manufacture or repair, which storage begins accruing after 30 days' written notice to the owner of the fact that storage is accruing and of the daily dollar amount thereof; and said notice shall be mailed to the owner by certified mail or statutory overnight delivery addressed to the owner at his last known address. Such special liens may be asserted by the retention of the personal property or the mechanic may surrender the personal property and give credit when the lien is enforced in accordance with Code Section 44-14-550; and if such special liens are asserted by retention of the personal property, the mechanic shall not be required to surrender the property to the holder of a subordinate security interest or lien. Such liens shall be superior to all liens except liens for taxes and, except as provided in subsection (2) of Code Section 11-9-310, such other liens as the mechanic may have had actual notice of before the work was done or material furnished.

(b) The maximum amount of storage that may be charged shall be $1.00 per day. Nothing contained in this Code section shall allow a fee for storage to be charged on any item with a fair market value in excess of $200.00. Storage charges pursuant to this Code section shall not apply to motor vehicles now or hereafter covered by Chapter 3 of Title 40 nor shall the storage fee be charged if there is a bona fide dispute

between the customer and the mechanic as to the manner of repair or the charges for repair.

(c)(1) When possession of the property is surrendered to the debtor, the mechanic shall record his or her claim of lien within 90 days after the work is done and the material is furnished or, in the case of repairs made on or to farm machinery, within 180 days after the work is done and the material is furnished. The claim of lien shall be recorded in the office of the clerk of the superior court of the county where the owner of the property resides. The claim shall be in substance as follows:

"A.B., mechanic, claims a lien on _____ (here describe the property) of C.B., for work done, material furnished, and storage accruing (as the case may be) in manufacturing, repairing, and storing (as the case may be) the same."

(2) If possession of the personal property subject to a special lien as provided in this Code section is surrendered to the debtor and if such special lien is not preserved by recording the claim of lien as provided in paragraph (1) of this subsection, the mechanic acquires a special lien on other personal property belonging to the debtor which comes into the possession of the mechanic, except that this sentence shall not apply to consumer goods which are being used by a consumer for personal, family, or household purposes or which have been bought by a consumer for use for personal, family, or household purposes. The special lien created by this paragraph shall be subject to the provisions of this Code section as to foreclosure and recording. (Ga. L. 1873, p. 42, § 8; Code 1873, § 1981; Code 1882, § 1981; Ga. L. 1884-85, p. 43, § 1; Civil Code 1895, § 2805; Civil Code 1910, § 3354; Code 1933, § 67-2003; Ga. L. 1953, Nov.-Dec. Sess., p. 275, § 1; Ga. L. 1960, p. 912, § 1; Ga. L. 1972, p. 415, § 1; Ga. L. 1979, p. 902, § 1; Ga. L. 1980, p. 831, § 2; Ga. L. 1984, p. 561, § 1; Ga. L. 1985, p. 1107, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2010, p. 776, § 1/HB 1147.)

The 2010 amendment, effective July 1, 2010, in the first sentence of paragraph (c)(1), inserted "or her" near the beginning, and deleted "aircraft or" preceding "farm machinery" near the end. See the editor's note for applicability.

Editor's notes. — Ga. L. 2010, p. 776, § 3, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all liens filed on or after July 1, 2010.

JUDICIAL DECISIONS

Cited in Demido v. Wilson, 261 Ga. App. 165, 582 S.E.2d 151 (2003).

44-14-364. Release of lien on approval of bond; amount; real property bonds; schedule, affidavit, and recordation; superior court clerk held harmless for good faith discretionary acts in connection with bond approval.

(a) When any person entitled under this part to claim a lien against any real estate located in this state files his or her lien in the office of the clerk of the superior court of the county in which the real estate is located, the owner of the real estate or the contractor employed to improve the property may, before or after foreclosure proceedings are instituted, discharge the lien upon the approval of a bond by the clerk of superior court. The bond shall be conditioned to pay to the holder of the lien the sum that may be found to be due the holder upon the trial of any lien action that may be filed by the lienholder to recover the amount of his or her claim within 365 days from the time the claim of lien is filed. The bond shall be in double the amount claimed under that lien and shall be either a bond with good security approved by the clerk of superior court or a cash bond, except in cases involving a lien against the owner's domicile, in which event the bond shall be in the amount claimed under the lien. An owner or contractor may be required to provide supporting data to the clerk to prove the value of domiciled property when such property serves as a bond to discharge a lien provided for in this Code section. Upon the approval by the clerk of the bond provided for in this Code section, the real estate shall be discharged from the lien. For purposes of this subsection, the term "domicile" means the established, fixed, permanent, or ordinary dwelling place of the owner.

(b) Within seven days of filing the bond required by subsection (a) of this Code section and any attachments, the party filing such bond shall send a notice of filing such bond and a copy of the bond by registered or certified mail or statutory overnight delivery to the lien claimant at the address stated on the lien or, if no such address is shown for the lien claimant, to the person shown as having filed such lien on behalf of the claimant at the indicated address of such person or, if the bond is filed by a contractor, to the owner of the property, provided that whenever the lien claimant or the owner is an entity on file with the Secretary of State's Corporations Division, sending the notice of filing such bond and a copy of the bond to the company's address or the registered agent's address on file with the Secretary of State shall be deemed sufficient; provided, however, that the failure to send the notice of filing the bond and copy of the bond shall not invalidate the bond for purposes of discharge of a claim of lien under this Code section. With respect to property bonds, the clerk shall not accept any real property bond unless the real property is scheduled in an affidavit attached thereto setting forth a description of the property and indicating the record owner

thereof, including any liens and encumbrances and amounts thereof, the market value, and the value of the sureties' interest therein, which affidavit shall be executed by the owner or owners of the interest; the bond and affidavit shall be recorded in the same manner and at the same cost as other deeds of real property. So long as the bond exists, it shall constitute a lien against the property described in the attached affidavit.

(c) The clerk of the superior court shall have the right to rely upon the amount specified in the claim of lien in determining the sufficiency of any bond to discharge under this Code section. The failure to specify both the amount claimed due under the lien and the date said claim was due shall result in such lien not constituting notice for any purposes.

(d) The clerk of the superior court shall be held harmless for good faith regarding any discretionary act in connection with approval of any bond provided for in this Code section. (Code 1933, § 67-2004, enacted by Ga. L. 1953, Jan.-Feb. Sess., p. 544, § 1; Ga. L. 1972, p. 469, § 1; Ga. L. 1981, p. 916, § 1; Ga. L. 1983, p. 1450, § 2; Ga. L. 2008, p. 1063, § 4/SB 374; Ga. L. 2012, p. 173, § 1-37/HB 665.)

The 2008 amendment, effective March 31, 2009, in subsection (a), inserted "or her" in the first and second sentences, in the second sentence, inserted "lien" preceding "action", substituted "365 days" for "12 months", and substituted "of lien is filed" for "becomes due" at the end, and added the fifth sentence.

The 2012 amendment, effective July 1, 2012, in subsection (a), substituted "upon the approval of a bond by the clerk of superior court" for "by filing a bond in the office of that clerk" in the first sentence, in the third sentence, substituted "clerk of superior court" for "clerk of the court", and substituted "the owner's domicile" for "residential property", added the fourth sentence, substituted "approval by the clerk" for "filing" in the fifth sentence, and added the last sentence; added the subsection (b) designation; near the beginning of the first sentence of subsection (b), substituted "the bond required by subsection (a) of this Code section" for "such bond" and substituted "such bond" for "the bond"; redesignated former subsection (b) as present subsection (c); and added subsection (d).

Law reviews. — For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

JUDICIAL DECISIONS

Compliance with statutory requirement. — Trial court properly granted summary judgment to the materialman on its action to recover on a lien release bond after an electrical subcontractor did not pay for materials supplied to it by the materialman, and despite the claim of the general contractor and the surety that the materialman did not comply with a lien statute notice requirement; the lien statute notice requirement was meant to protect prospective purchasers from unknowingly buying property encumbered by liens and did not apply to the materialman's situation because the materialman, acting as a lien claimant, was attempting to recover on a lien discharge bond that the general contractor and the surety had filed to discharge the lien against the electrical contractor. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99 (2004).

In the general contractor's action against the materials provider relating to the provider's request for payment under

a payment bond, the trial court erred by declaring that the payment bond obtained and recorded by the general contractor served as substituted collateral for the construction project and in discharging the materialmen's lien filed by the provider; O.C.G.A. § 10-7-31 was silent on the issue of how or whether the bond affected materialmen's liens, and, under O.C.G.A. § 44-14-364(a), the bond did not satisfy the essential requirements of a lien release bond since the bond was obtained before the provider filed its lien claim and there was nothing indicating that the bond was issued with good security approved by the clerk. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. 2007).

Cited in Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 289 Ga. App. 355, 657 S.E.2d 290 (2008).

44-14-366. Waiver of lien or claim upon bond in advance of furnishing labor, services, or materials void; interim waiver and release upon payment; unconditional waiver and release upon final payment; affidavit of nonpayment.

(a) A right to claim a lien or to claim upon a bond may not be waived in advance of furnishing of labor, services, or materials. Any purported waiver or release of lien or bond claim or of this Code section executed or made in advance of furnishing of labor, services, or materials is null, void, and unenforceable.

(b) No oral or written statement by the claimant purporting to waive, release, impair, or otherwise adversely affect a lien or bond claim is enforceable or creates an estoppel or impairment of claim of lien or claim upon a bond unless:

(1) It is pursuant to a waiver and release form duly executed by claimant prescribed below; and

(2) The claimant has received payment for the claim as set forth in subsection (f) of this Code section.

(c) When a claimant is requested to execute a waiver and release in exchange for or in order to induce payment other than final payment, the waiver and release shall substantially follow the following form, in boldface capital letters in at least 12 point font and the priority of such claimant's lien rights, except as to retention, shall upon such payment thereafter run from the day after the date specified in such Interim Waiver and Release upon Payment form:

"INTERIM WAIVER AND RELEASE UPON PAYMENT

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME

OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

UPON THE RECEIPT OF THE SUM OF $_____, THE MECHANIC AND/OR MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY RIGHTS AGAINST ANY LABOR AND/OR MATERIAL BOND THROUGH THE DATE OF _____ (DATE) AND EXCEPTING THOSE RIGHTS AND LIENS THAT THE MECHANIC AND/OR MATERIALMAN MIGHT HAVE IN ANY RETAINED AMOUNTS, ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH, FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID CONTRACTOR FOR SAID BUILDING OR PREMISES.

GIVEN UNDER HAND AND SEAL THIS _____ DAY OF _____, _____.

_____ (SEAL)

_____

_____

(WITNESS)

_____

(ADDRESS)

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT,

60 DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN PRIOR TO THE EXPIRATION OF SUCH 60 DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A. SECTION 44-14-366."

Provided, however, that the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

(d) When a claimant is requested to execute a waiver and release in exchange for or in order to induce making of final payment, the waiver and release shall substantially follow the following form in boldface capital letters in at least 12 point font:

"WAIVER AND RELEASE
UPON FINAL PAYMENT

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

UPON THE RECEIPT OF THE SUM OF $ _____, THE MECHANIC AND/OR MATERIALMAN WAIVES AND RELEASES ANY AND ALL LIENS OR CLAIMS OF LIENS IT HAS UPON THE FOREGOING DESCRIBED PROPERTY OR ANY

RIGHTS AGAINST ANY LABOR AND/OR MATERIAL BOND ON ACCOUNT OF LABOR OR MATERIALS, OR BOTH, FURNISHED BY THE UNDERSIGNED TO OR ON ACCOUNT OF SAID CONTRACTOR FOR SAID PROPERTY.

GIVEN UNDER HAND AND SEAL THIS _____ DAY OF _____, _____.

_____ (SEAL)

_____

_____

(WITNESS)

_____

(ADDRESS)

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, 60 DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN PRIOR TO THE EXPIRATION OF SUCH 60 DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER O.C.G.A. SECTION 44-14-366."

Provided, however, that the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

(e) Nothing contained in this Code section shall affect:

(1) The enforceability of any subordination of lien rights by a potential lien claimant to the rights of any other party which may have or acquire an interest in all or any part of the real estate, factories, railroads, or other property for which the potential lien claimant has furnished labor, services, or material, even though such subordination is entered into in advance of furnishing labor, services, or material and even though the claimant has not actually received payment in full for its claim;

(2) The enforceability of any waiver of lien rights given in connection with the settlement of a bona fide dispute concerning the amount due the lien claimant for labor, services, or material which have already been furnished;

(3) The validity of a cancellation or release of a recorded claim of lien or preliminary notice of lien rights; or

(4) The provisions of paragraph (2) of subsection (a) of Code Section 44-14-361.2, paragraphs (3) and (4) of subsection (a) and subsections (b) and (c) of Code Section 44-14-361.4, or Code Section 44-14-364.

(f)(1) When a waiver and release provided for in this Code section is executed by the claimant, it shall be binding against the claimant for all purposes, subject only to payment in full of the amount set forth in the waiver and release.

(2) Such amounts shall conclusively be deemed paid in full upon the earliest to occur of:

(A) Actual receipt of funds;

(B) Execution by the claimant of a separate written acknowledgment of payment in full; or

(C) Sixty days after the date of the execution of the waiver and release, unless prior to the expiration of said 60 day period the claimant files a claim of lien or files in the county in which the property is located an affidavit of nonpayment, using substantially the following form in boldface capital letters in at least 12 point font:

"AFFIDAVIT OF NONPAYMENT UNDER O.C.G.A. SECTION 44-14-366

STATE OF GEORGIA

COUNTY OF _____

THE UNDERSIGNED MECHANIC AND/OR MATERIALMAN HAS BEEN EMPLOYED BY _____ (NAME OF CONTRACTOR) TO FURNISH _____ (DESCRIBE MATERIALS AND/OR LABOR) FOR THE CONSTRUCTION OF IMPROVEMENTS KNOWN AS _____ (TITLE OF THE PROJECT OR BUILDING) WHICH IS LOCATED IN THE CITY OF _____, COUNTY OF _____, AND IS OWNED BY _____ (NAME OF OWNER) AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

_____

_____

_____

(DESCRIBE THE PROPERTY UPON WHICH THE IMPROVEMENTS WERE MADE BY USING EITHER A

METES AND BOUNDS DESCRIPTION, THE LAND LOT DISTRICT, BLOCK AND LOT NUMBER, OR STREET ADDRESS OF THE PROJECT.)

PURSUANT TO O.C.G.A. SECTION 44-14-366 THE UNDERSIGNED EXECUTED A LIEN WAIVER AND RELEASE WITH RESPECT TO THIS PROPERTY DATED _____, _____. THE AMOUNT SET FORTH IN SAID WAIVER AND RELEASE ($_____) HAS NOT BEEN PAID, AND THE UNDERSIGNED HEREBY GIVES NOTICE OF SUCH NONPAYMENT.

THE ABOVE FACTS ARE SWORN TRUE AND CORRECT BY THE UNDERSIGNED, THIS _____ DAY OF _____, _____.

_____ (SEAL)
CLAIMANT'S SIGNATURE

SWORN TO AND EXECUTED
IN THE PRESENCE OF:

_____
WITNESS

_____
NOTARY PUBLIC

WITHIN SEVEN DAYS OF FILING THIS AFFIDAVIT OF NONPAYMENT, THE FILING PARTY SHALL SEND A COPY OF THE AFFIDAVIT BY REGISTERED OR CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY TO THE OWNER OF THE PROPERTY. IF THE FILING PARTY IS NOT IN PRIVITY OF CONTRACT WITH THE PROPERTY OWNER AND A NOTICE OF COMMENCEMENT IS FILED FOR THE IMPROVEMENT ON THE PROPERTY FOR WHICH THE FILING PARTY'S LABOR, SERVICES, OR MATERIALS WERE FURNISHED, A COPY OF THE AFFIDAVIT SHALL BE SENT TO THE CONTRACTOR AT THE ADDRESS SHOWN ON THE NOTICE OF COMMENCEMENT. WHENEVER THE OWNER OF THE PROPERTY IS AN ENTITY ON FILE WITH THE SECRETARY OF STATE'S CORPORATIONS DIVISION, SENDING A COPY OF THE LIEN TO THE COMPANY'S ADDRESS OR THE REGISTERED AGENT'S ADDRESS ON FILE WITH THE SECRETARY OF STATE SHALL BE DEEMED SUFFICIENT."

(3) A claimant who is paid, in full, the amount set forth in the waiver and release form after filing an affidavit of nonpayment shall upon request execute in recordable form an affidavit swearing that

payment in full has been received. Upon recordation thereof in the county in which the Affidavit of Nonpayment was recorded, the affidavit of nonpayment to which it relates shall be deemed void.

(4) Nothing in this Code section shall shorten the time within which to file a claim of lien.

(5) A waiver and release provided in this Code section shall be suspended upon filing of an affidavit of nonpayment until payment in full has been received.

(6) The claimant may rely upon the information contained in the waiver and release form when completing for filing the affidavit of nonpayment or claim of lien. (Code 1981, § 44-14-366, enacted by Ga. L. 1991, p. 915, § 3; Ga. L. 1999, p. 81, § 44; Ga. L. 2008, p. 1063, § 5/SB 374; Ga. L. 2012, p. 775, § 44/HB 942.)

The 2008 amendment, effective March 31, 2009, rewrote this Code section.

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (f)(2)(C).

Law reviews. — For annual survey of construction law, see 57 Mercer L. Rev. 79 (2005). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Limitations period. — Because a 30-day limitations period in a contract between a general contractor and a subcontractor for the subcontractor to request arbitration of a dispute between the parties after notice by the contractor of default by the subcontractor did not contravene O.C.G.A. § 44-14-366, the trial court did not err in enforcing the provision; the subcontractor's conduct, not the terms of the contract, impaired the subcontractor's claim and any lien rights the subcontractor would have had with respect to that claim had the subcontractor timely arbitrated the contractor's decision to a favorable result. Holt & Holt, Inc. v. Choate Constr. Co., 271 Ga. App. 292, 609 S.E.2d 103 (2004).

44-14-367. Notice; required statement.

Failure of a lien claimant to commence a lien action to collect the amount of his or her claim within 365 days from the date of filing the lien, or failure of the lien claimant to file the statutory notice of commencement of lien action in the county where the property is located, renders the claim of lien unenforceable. A claim of lien may be disregarded if no notice of commencement of lien action was filed within 395 days from the date the claim of lien was filed. Any lien filed after March 31, 2009, shall include on the face of the lien the following statement in at least 12 point bold font: "This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period." Failure to include such language shall invalidate the lien and prevent it from being filed. No release or voiding of such liens shall be required. A lien

shall expire sooner and be disregarded once it is determined that no notice of commencement was timely filed in response to a notice of contest pursuant to Code Section 44-14-368. (Code 1981, § 44-14-367, enacted by Ga. L. 1998, p. 860, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 1063, § 6/SB 374.)

The 2008 amendment, effective March 31, 2009, rewrote this Code section.

Law reviews. — For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

JUDICIAL DECISIONS

Creditor's time for notice tolled under bankruptcy provisions. — Bankruptcy court held that the procedure under O.C.G.A. § 44-14-361.1 to "make good" a mechanic's or materialman's lien involved creating the lien, not mere perfection, and these acts were subject to an automatic stay; accordingly, because the automatic stay prevented the creditor from complying with O.C.G.A. § 44-14-361.1, the creditor's failure to take further action under that statute was tolled under 11 U.S.C. § 108. In re Durango Ga. Paper Co., 297 B.R. 316 (Bankr. S.D. Ga. 2003).

Lien not authorized. — If a county housing authority owned property, regardless of its future plans to sell the same to private parties, it remained public property; thus, a private contractor was not authorized to place a lien on the property. Vakilzadeh Enters. v. Hous. Auth. of DeKalb, Ga., 271 Ga. App. 130, 608 S.E.2d 724 (2004).

Because a subcontractor did not actually comply with O.C.G.A. § 43-14-8(f) as the evidence indicated that a Georgia-licensed electrician that the subcontractor affiliated itself with through an alleged joint venture only presented electrical contracting licenses when permits for the work were applied for and took no action to inspect others' electrical work or to verify that the work complied with the applicable codes, the subcontractor could not enforce the subcontract with the contractor, could not recover in quantum meruit under O.C.G.A. § 9-2-7 as the express contract violated public policy, and could not file a subcontractor's lien under O.C.G.A. §§ 44-14-361.1 and 44-14-367. JR Construction/Electric, LLC v. Ordner Constr. Co., 294 Ga. App. 453, 669 S.E.2d 224 (2008).

44-14-368. Notice of contest of lien.

(a) An owner or an owner's agent or attorney, or the contractor or contractor's agent or attorney, may elect to shorten the time prescribed in which to commence a lien action to enforce any claim of lien by recording in the superior court clerk's office a notice in substantially the following form, in boldface capital letters in at least 12 point font, along with proof of delivery upon the lien claimant:

"NOTICE OF CONTEST OF LIEN

TO: [NAME AND ADDRESS OF LIEN CLAIMANT]

YOU ARE NOTIFIED THAT THE UNDERSIGNED CONTESTS THE CLAIM OF LIEN FILED BY YOU ON _____ 20 ___, AND RECORDED IN _____ BOOK _____, PAGE _____ OF THE PUBLIC RECORDS OF _____

COUNTY, GEORGIA, AGAINST PROPERTY OWNED BY _____, AND THAT THE TIME WITHIN WHICH YOU MAY COMMENCE A LIEN ACTION TO ENFORCE YOUR LIEN IS LIMITED TO 60 DAYS FROM RECEIPT OF THIS NOTICE. THIS _____ DAY OF _____, 20___.

THIS ABOVE-REFERENCED LIEN WILL EXPIRE AND BE VOID IF YOU DO NOT: (1) COMMENCE A LIEN ACTION FOR RECOVERY OF THE AMOUNT OF THE LIEN CLAIM PURSUANT TO O.C.G.A. SECTION 44-14-361.1 WITHIN 60 DAYS FROM RECEIPT OF THIS NOTICE; AND (2) FILE A NOTICE OF COMMENCEMENT OF LIEN ACTION WITHIN 30 DAYS OF FILING THE ABOVE-REFERENCED LIEN ACTION.

SIGNED: _____
(OWNER, CONTRACTOR, AGENT OR ATTORNEY)"

(b) The clerk of the superior court shall cross-reference the notice of contest of lien to the lien. The owner or his or her agent or attorney, or the contractor or his or her agent or attorney, shall send a copy of the notice of contest of lien within seven days of filing by registered or certified mail or statutory overnight delivery to the lien claimant at the address noted on the face of the lien. Service shall be deemed complete upon mailing.

(c) The lien shall be extinguished by law 90 days after the filing of the notice of contest of lien if no notice of commencement of lien action is filed in that time period. No release or voiding of such liens shall be required. This subsection shall not be construed to extend the time in which a lien action must begin. (Code 1981, § 44-14-368, enacted by Ga. L. 2008, p. 1063, § 7/SB 374.)

Effective date. — This Code section became effective March 31, 2009.

Law reviews. — For survey article on construction law, see 60 Mercer L. Rev. 59 (2008).

44-14-369. Computation of certain time periods.

For the purposes of this part, the computation of time shall be determined pursuant to paragraph (3) of subsection (d) of Code Section 1-3-1. (Code 1981, § 44-14-369, enacted by Ga. L. 2008, p. 1063, § 7/SB 374.)

Effective date. — This Code section became effective March 31, 2009.

Part 4

Laborers

44-14-381. Special lien; priorities.

JUDICIAL DECISIONS

Independent contractors, as well as employees, may assert a special laborer's lien. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283 (2009).

Parent who planted could not assert lien. — As a farmer's parent planted and picked cotton and did not oversee others while others performed these tasks, the parent was a "laborer" for purposes of O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283 (2009).

Lien against a farmer's crop. — As O.C.G.A. § 44-14-550 contemplated that at the initial probable cause hearing, the trial court would inquire as to whether the plaintiff had put forth facts necessary to constitute a laborer's lien and the amount due, the trial court did not err in reviewing the facts of the case in order to determine whether there was probable cause to believe a laborer could validly assert a special lien against a farmer's crop for the debt under O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283 (2009).

Part 5

Pawnbrokers, Factors, Bailees, Acceptors, and Depositories

44-14-400. Liens of pawnbrokers, factors, bailees, and acceptors; priorities.

JUDICIAL DECISIONS

Bailee's lien inferior to recorded security interest. — Bailee's lien was inferior to a cooperative banks' duly recorded security interest in peanuts. Farm Credit of Northwest Fla., ACA v. Easom Peanut Co., 312 Ga. App. 374, 718 S.E.2d 590 (2011), cert. denied, 2012 Ga. LEXIS 315 (Ga. 2012).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Factors and Commission Merchants, § 2.

44-14-403. Lien of pawnbroker; action for interference; grace period on pawn transactions; extension or continuation of maturity date; redemption of goods after maturity date.

JUDICIAL DECISIONS

Motor vehicle as subject of pawn transaction. — Bankruptcy court found that the creditor was not entitled to summary judgment regarding the debtor's re-

possessed vehicle action where the pawnshop agreement in issue violated the statutory requirements for automobile title pawns under Georgia law. Johnson v. Speedee Cash of Columbus, Inc. (In re Johnson), 289 B.R. 251 (Bankr. M.D. Ga. 2002).

Debtors were not entitled to turn over to their estate a motor vehicle that had been pledged pre-petition to a pawn company because the debtors did not exercise their right of redemption within the 30 days allowed for redemption by O.C.G.A. § 44-14-103, the time for redemption had expired before the bankruptcy petition was filed, and the pawn company thus had a valid ownership interest in the car before the petition was filed. Barnette v. Bankers Fin. Servs. (In re Barnette), No. 07-12986-WHD, 2008 Bankr. LEXIS 1912 (Bankr. N.D. Ga. Apr. 9, 2008).

LLC that seized a Chapter 13 debtor's car 16 hours before the debtor declared bankruptcy, and sold the car without keeping records, was ordered to pay the debtor $6,579.57 for loss of the car, $300 for lost personal property that was in the car, $2,356.70 in emotional distress damages, and reasonable attorney's fees, pursuant to 11 U.S.C. § 362(k), because the evidence showed that the LLC knew the debtor declared bankruptcy before the LLC sold the car. Although the LLC claimed that the LLC was not liable under § 362 because the debtor forfeited rights in the car pursuant to the Georgia Pawnshop Act (GPA), O.C.G.A. § 44-14-403, when the debtor failed to repay a debt, the court rejected that argument because the LLC assessed interest rates over the course of the contract that exceeded the rates allowed by the GPA, such that a Motor Vehicle Pawn Contract the debtor signed was void from the contract's inception pursuant to O.C.G.A. § 44-12-131. Spinner v. Cash In A Hurry, LLC (In re Spinner), 398 B.R. 84 (Bankr. N.D. Ga. 2008).

Creditor violated 11 U.S.C. § 362 when the creditor failed to turn over a truck a debtor pledged as security, and the court ordered the creditor to turn over the truck and to pay the debtor $1,400 in damages from lost income and $2,152.50 in attorney's fees. Although the parties entered into a possession pawn agreement, the court found that the agreement violated O.C.G.A. § 44-14-403(b)(1) because the agreement did not give the debtor a grace period for payment, and because the agreement violated § 44-14-403(b)(1) the creditor did not obtain title to the truck before the debtor declared bankruptcy. Ballard v. Freedom Auto Plaza (In re Ballard), No. 10-71415, 2010 Bankr. LEXIS 3933 (Bankr. M.D. Ga. Nov. 1, 2010).

In a case in which a Chapter 13 debtor filed a motion to require the turnover of a truck and the creditor argued that ownership of the truck was forfeited to the creditor prior to the filing of the debtor's first bankruptcy case and that, as owner of the truck, the creditor was entitled to take possession of the truck after the dismissal of the first bankruptcy case and was not required to return the truck to the debtor upon the filing of the current case since the debtor had not redeemed the truck prior to the expiration of the grace period under O.C.G.A. § 44-14-403, the creditor was the owner of the truck at the time the first case was filed. Property of the estate did not include the truck since the debtor had pledged the truck as collateral in a pawn and had not exercised the debtor's right to redeem the property within the time provided in the contract or state law. Crump v. TitleMax (In re Crump), 467 B.R. 532 (Bankr. M.D. Ga. 2010).

Pawned vehicles were no longer property of the bankruptcy estate at the time of the vehicles' repossession because the debtors had not taken affirmative steps to redeem the vehicles in accordance with Georgia's pawnshop laws. Consequently, the pawnbroker did not violate the prohibition on obtaining possession of property of the estate in 11 U.S.C. § 362(a)(3). Moore v. Complete Cash Holdings, LLC (In re Moore), 448 B.R. 93 (Bankr. N.D. Ga. 2011).

Debtor was not entitled to turnover of the debtor's vehicle, which was repossessed from the debtor by the respondent, with whom the debtor had entered into a title pawn transaction because the debtor conceded the debtor's inability to redeem the vehicle before expiration of the statu-

tory redemption period, even as extended by the bankruptcy code. Paul v. S. Ga. Title Pawn (In re Paul), No. 14-11752-AEC, 2015 Bankr. LEXIS 494 (Bankr. M.D. Ga. Feb. 13, 2015).

Cited in Bell v. Instant Car Title Loans (In re Bell), 279 B.R. 890 (Bankr. N.D. Ga. 2002); Johnson v. Speedee Cash of Columbus, Inc. (In re Johnson), 289 B.R. 251 (Bankr. M.D. Ga. 2002).

44-14-410. Depositories of involuntary, gratuitous, or naked deposits — Lien; authorization to open containers; notice to owner.

JUDICIAL DECISIONS

Lien does not extend to profit and overhead. — Naked depository is entitled to a lien only for amounts paid out or labor expended by reason of the deposit, and such lien does not extend to profit or a pro rata portion of general overhead expenses. CHEP USA v. Mock Pallet Co., 2005 U.S. App. LEXIS 12604 (11th Cir. June 24, 2005) (Unpublished).

Part 7

Laundries, Cleaners, and Tailors

44-14-450. Creation of lien.

JUDICIAL DECISIONS

Applicability. — In a suit by a carpet manufacturer against a mill for breach of contract, the trial court properly granted the manufacturer's motion in limine to prevent the mill from complaining that it had a laundryman's lien on unused yarn and backing under O.C.G.A. § 44-14-450. The trial court was authorized to find that tufting the yarn was an initial manufacturing stage and that in tufting the yarn, the mill was not making alterations to carpet. Beaulieu Group, LLC v. S&S Mills, Inc., 292 Ga. App. 455, 664 S.E.2d 816 (2008).

44-14-453. Sale of goods after 90 days; sale of goods within 120 days where notice provided.

JUDICIAL DECISIONS

Cited in Beaulieu Group, LLC v. S&S Mills, Inc., 292 Ga. App. 455, 664 S.E.2d 816 (2008).

44-14-455. Disposition of proceeds of sale.

JUDICIAL DECISIONS

Cited in Beaulieu Group, LLC v. S&S Mills, Inc., 292 Ga. App. 455, 664 S.E.2d 816 (2008).

PART 8

HOSPITALS AND NURSING HOMES

Law reviews. — For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

44-14-470. Lien on causes of action accruing to injured person for costs of care and treatment of injuries arising out of such causes of action.

(a) Except where the context otherwise requires in subsection (b) of this Code section, as used in this part, the term:

(1) "Hospital" means any hospital or nursing home subject to regulation and licensure by the Department of Community Health.

(2) "Hospital care, treatment, or services" means care, treatment, or services furnished by a hospital or nursing home.

(3) "Nursing home" means any intermediate care home, skilled nursing home, or intermingled home.

(4) "Physician practice" means any medical practice that includes one or more physicians licensed to practice medicine in this state.

(5) "Traumatic burn care medical practice" means care, treatment, or services rendered by a medical practice with respect to a patient whose burn care, treatment, or services resulted in charges in excess of $50,000.00, arising out of a single accident or occurrence.

(b) Any person, firm, hospital authority, or corporation operating a hospital, nursing home, or physician practice or providing traumatic burn care medical practice in this state shall have a lien for the reasonable charges for hospital, nursing home, physician practice, or traumatic burn care medical practice care and treatment of an injured person, which lien shall be upon any and all causes of action accruing to the person to whom the care was furnished or to the legal representative of such person on account of injuries giving rise to the causes of action and which necessitated the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice care, subject, however, to any attorney's lien. The lien provided for in this subsection is only a lien against such causes of action and shall not be a lien against such injured person, such legal representative, or any other property or assets of such persons and shall not be evidence of such person's failure to pay a debt. This subsection shall not be construed to interfere with the exemption from this part provided by Code Section 44-14-474. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 1; Ga. L. 1983, p. 548, § 1; Ga. L. 1986, p. 222, § 1; Ga. L. 2002, p. 1141, § 1;

Ga. L. 2002, p. 1429, § 1; Ga. L. 2004, p. 394, § 1; Ga. L. 2008, p. 12, § 2-36/SB 433.)

The 2004 amendment, effective July 1, 2004, added present paragraph (a)(4); redesignated former paragraph (a)(4) as present paragraph (a)(5); and, in subsection (b), substituted "hospital, nursing home, or physician practice" for "hospital or nursing home" and inserted "physician practice," twice.

The 2008 amendment, effective July 1, 2009, substituted "Department of Community Health" for "Department of Human Resources" in paragraph (a)(1).

JUDICIAL DECISIONS

Construction. — Georgia's law providing for a hospital lien against a patient for services rendered, O.C.G.A. § 44-14-470 et seq., must be strictly construed. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72 (2010).

Whether debt obligation of patient or other person or entity. — Court of appeals erred in holding that a debt had to be owed by a patient in order for a hospital to foreclose on a lien because it was not authorized to impose a requirement to O.C.G.A. § 44-14-470 that was not expressly stated therein; the hospital lien statute is silent as to whether the debt must be the obligation of the patient or the obligation of some other person or entity. MCG Health, Inc. v. Owners Ins. Co., 288 Ga. 782, 707 S.E.2d 349 (2011).

Discovery in hospital lien case. — In a hospital lien case, the trial court erred by granting a patient's motion to compel seeking discovery from a medical center as to the center's rate-setting agreements with insurers and the center's revenue and other information because the patient was uninsured and such discovery was not relevant nor reasonably calculated to lead to admissible evidence. Med. Ctr., Inc. v. Bowden, 327 Ga. App. 714, 761 S.E.2d 116 (2014).

Hospital could assert lien for full amount of charges, even if most were written off pursuant to managed healthcare contract. — Because a patient could have sought recovery of $24,794 from a tortfeasor of a hospital's billed charges incurred for his injuries, the hospital was entitled to assert a lien under O.C.G.A. § 44-14-471(b) for the unpaid portion of those billed charges, even though the patient's managed care insurer was not responsible to pay these charges in full. The court held that Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718 (2005), had been implicitly overruled in part. MCG Health, Inc. v. Kight, 325 Ga. App. 349, 750 S.E.2d 813 (2013).

Uninsured motorist insurance.

Under O.C.G.A. § 33-7-11(b)(1)(D)(ii), a uninsured motorist (UM) carrier was entitled to set off a payment that the tortfeasor's liability carrier made directly to a hospital that had a hospital lien. The insured's election to divert part of the liability payment to satisfy the insured's hospital bill did not reduce the available liability coverage or increase the insured's UM coverage; the cases relied upon by the insured were not controlling, as payment under the hospital lien statute, O.C.G.A. § 44-14-470, was not mandatory. Adams v. State Farm Mut. Auto. Ins. Co., No. A08A2315, 2009 Ga. App. LEXIS 151 (Feb. 17, 2009).

Under O.C.G.A. §§ 33-7-11(b)(1)(D)(ii) (underinsured motorist coverage) and 44-14-470(b) (hospital liens), a tortfeasor's insurer's payment of a hospital lien represented partial satisfaction of an injured insured's claim; the injured insured's UIM carrier was entitled to a credit for the payment of the lien against the insured's coverage. State Farm Mut. Auto. Ins. Co. v. Adams, 288 Ga. 315, 702 S.E.2d 898 (2010).

TRICARE coverage impacting recovery by hospital. — Trial court did not err in dismissing for failure to state a claim upon which relief could be granted a healthcare provider's action against an insurer to collect on a hospital lien for services provided to a patient after the

patient was injured in an automobile accident caused by an insured because the statutory and regulatory scheme that governed the United States Department of Defense TRICARE health insurance program did not provide any basis for allowing a contracting civilian healthcare provider to collect the provider's treatment costs from a third-party tortfeasor/payer, and any state law that interfered with the financing of healthcare claims for TRICARE beneficiaries was preempted as a matter of federal statutory and regulatory law, 10 U.S.C. § 1103 and 32 C.F.R. § 199.17(a)(7); even if the healthcare provider was not obligated to adhere to the TRICARE statutory and regulatory scheme, by attempting to collect the provider's lien from the patient's settlement funds, the healthcare provider was violating the provider's contract with a corporation, which prohibited the provider from obtaining any recourse from the TRICARE beneficiary. MCG Health, Inc. v. Owners Ins. Co., 288 Ga. 782, 707 S.E.2d 349 (2011).

A hospital had a valid lien, etc.

Trial court erred by granting partial summary judgment to a patient because the hospital was not precluded from filing a hospital lien in order to collect charges associated with the patient's treatment since the hospital's contract with the patient's insurer explicitly reserved the hospital's right to collect deductibles and co-pays directly from the patient, irrespective of the agreement to hold the patient responsible only for a discounted price of treatment. Kight v. MCG Health, Inc., 296 Ga. 687, 769 S.E.2d 923 (2015).

Hospital's lien was invalid. — Trial court erred in denying the plaintiffs' motion to strike a hospital's lien under O.C.G.A. § 44-14-470(b) for the full amount of a hospital bill; the hospital did not dispute that a patient's operation was covered by an agreement between the hospital and an insurer; thus, the hospital would be held to the terms of the bargain it struck. Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718 (2005).

Although contract provisions between the U.S. Department of Defense TRICARE health insurance program and a hospital allowed the filing of a hospital lien against a tortfeasor's insurer under O.C.G.A. § 44-14-470(b), the lien was invalid because other provisions of the contract negated any debt that could support it. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72 (2010).

Children's wrongful death claims have priority over hospital's claim of lien. — Since the decedent's children filed a wrongful death complaint in relation to their mother's death in a car wreck, the available insurance proceeds were then deposited into a court registry without the mother's estate ever making a claim for medical payments, and since the available insurance proceeds were insufficient to cover both the children's wrongful death claims and the O.C.G.A. § 44-14-470(b) medical services lien of a hospital which provided medical services to the mother after the car wreck, the trial court erred in satisfying the hospital's lien from the limited funds instead of satisfying the children's claims. Nash v. Allstate Ins. Co., 256 Ga. App. 143, 567 S.E.2d 748 (2002).

Inclusion of lien language did not invalidate settlement agreement. — Trial court properly awarded summary judgment to plaintiffs to enforce a settlement agreement because inclusion of the statutory healthcare-provider lien affidavit release information did not constitute a counteroffer and did not alter the fact that a meeting of the minds has occurred with regard to the terms of the settlement. Sherman v. Dickey, 322 Ga. App. 228, 744 S.E.2d 408 (2013).

Insurer's obligation to timeply pay settlement demand did not impermissibly conflict with duty to satisfy hospital's lien. — An injured party's time-limited demand on an insurer to settle the injured party's claim for policy limits, and a hospital's assertion of a lien for the injured party's care, did not place the insurer in the position of being required to make payments in excess of policy limits because the insurer could create a "safe harbor" from liability for a bad faith refusal to settle when (1) the hospital promptly settled a case involving clear liability and special damages exceeding policy limits, and (2) the sole reason for an inability to settle was an

injured party's unreasonable refusal to assure satisfaction of outstanding hospital liens. Southern Gen. Ins. Co. v. Wellstar Health Sys., 315 Ga. App. 26, 726 S.E.2d 488 (2012).

RESEARCH REFERENCES

ALR. — Propriety and use of balance billing in health care context, 69 ALR6th 317.

44-14-471. Filing of verified statement; contents; notice.

(a) In order to perfect the lien provided for in Code Section 44-14-470, the operator of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice:

(1) Shall, not less than 15 days prior to the date of filing the statement required under paragraph (2) of this subsection, provide written notice to the patient and, to the best of the claimant's knowledge, the persons, firms, corporations, and their insurers claimed by the injured person or the legal representative of the injured person to be liable for damages arising from the injuries and shall include in such notice a statement that the lien is not a lien against the patient or any other property or assets of the patient and is not evidence of the patient's failure to pay a debt. Such notice shall be sent to all such persons and entities by first-class and certified mail or statutory overnight delivery, return receipt requested; and

(2) Shall file in the office of the clerk of the superior court of the county in which the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice is located and in the county wherein the patient resides, if a resident of this state, a verified statement setting forth the name and address of the patient as it appears on the records of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice; the name and location of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice and the name and address of the operator thereof; the dates of admission and discharge of the patient therefrom or with respect to a physician practice, the dates of treatment; and the amount claimed to be due for the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice care, which statement must be filed within the following time period:

(A) If the statement is filed by a hospital, nursing home, or provider of traumatic burn care medical practice, then the statement shall be filed within 75 days after the person has been discharged from the facility; or

(B) If the statement is filed by a physician practice, then the statement shall be filed within 90 days after the person first sought treatment from the physician practice for the injury.

(b) The filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section. The failure to perfect such lien by timely complying with the notice and filing provisions of paragraphs (1) and (2) of subsection (a) of this Code section shall invalidate such lien, except as to any person, firm, or corporation liable for the damages, which receives prior to the date of any release, covenant not to bring an action, or settlement, actual notice of a notice and filed statement made under subsection (a) of this Code section, via hand delivery, certified mail, return receipt requested, or statutory overnight delivery with confirmation of receipt. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 2; Ga. L. 1978, p. 1371, § 1; Ga. L. 2002, p. 1141, § 2; Ga. L. 2002, p. 1429, § 2; Ga. L. 2003, p. 140, § 44; Ga. L. 2004, p. 394, § 2; Ga. L. 2006, p. 334, § 2/SB 306.)

The 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, in paragraph (a)(1), deleted "hospital" preceding "claimant's knowledge" in the first sentence and revised punctuation in the second sentence.

The 2004 amendment, effective July 1, 2004, inserted "physician practice," throughout subsection (a); substituted "Shall, not less than 30 days prior to the date of filing the statement required under paragraph (2) of this subsection," for "Within 30 days after the person has been discharged therefrom, shall" in the first sentence of paragraph (a)(1); and, in paragraph (a)(2), substituted "30 days" for "15 days" near the beginning and inserted "or with respect to a physician practice, the dates of treatment" near the end.

The 2006 amendment, effective July 1, 2006, substituted "15 days" for "30 days" in the first sentence of paragraph (a)(1); in paragraph (a)(2), deleted ", no sooner than 30 days after the date of the written notice provided for in this Code section," following "Shall file" near the beginning, added ", which statement must be filed within the following time period:" at the end, and added subparagraphs (a)(1)(A) and (a)(1)(B); and substituted the present provisions of subsection (b) for the former provisions which read "The filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages, whether or not they received the written notice provided for in this Code section. The failure to perfect such lien in accordance with this Code section shall invalidate such lien."

Law reviews. — For annual survey of trial practice and procedure, see 56 Mercer L. Rev. 433 (2004).

JUDICIAL DECISIONS

Hospital could assert lien for full amount of charges, even if most were written off pursuant to managed healthcare contract. — Because a patient could have sought recovery of $24,794 from a tortfeasor of a hospital's billed charges incurred for his injuries, the hospital was entitled to assert a lien under O.C.G.A. § 44-14-471(b) for the unpaid portion of those billed charges, even though the patient's managed care insurer was not responsible to pay these charges in full. The court held that Constantine v. MCG Health, Inc., 275 Ga. App. 128, 619 S.E.2d 718 (2005), had been implicitly overruled in part. MCG Health,

Inc. v. Kight, 325 Ga. App. 349, 750 S.E.2d 813 (2013).

44-14-472. Duties of clerk; lien book; fee.

The clerk of the superior court shall endorse the date and hour of filing on the statement filed pursuant to Code Section 44-14-471; and, at the expense of the county, the clerk shall provide a lien book with a proper index in which the clerk shall enter the date and hour of the filing; the names and addresses of the hospital, nursing home, physician practice, or provider of traumatic burn care medical practice, the operators thereof, and the patient; and the amount claimed. The information shall be recorded in the name of the patient. The clerk shall receive a fee as required by subparagraph (f)(1)(A) of Code Section 15-6-77 as his or her fee for such filing. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 3; Ga. L. 1981, p. 1396, § 18; Ga. L. 1992, p. 6, § 44; Ga. L. 2002, p. 1141, § 3; Ga. L. 2002, p. 1429, § 3; Ga. L. 2003, p. 140, § 44; Ga. L. 2004, p. 394, § 3; Ga. L. 2006, p. 334, § 3/SB 306.)

The 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, deleted "hospital" preceding "lien book" and revised punctuation throughout this Code section.

The 2004 amendment, effective July 1, 2004, inserted "physician practice," near the middle of the first sentence.

The 2006 amendment, effective July 1, 2006, deleted the former second sentence of this Code section which read "Notwithstanding the provisions in Code Section 44-2-2, a lien provided for in Code Section 44-14-470 shall be filed in a separate docket from and shall not be commingled with judgment liens, materialmen's liens, mechanics' liens, tax liens, lis pendens notices, or any other liens that attach to the person or property of an individual."

44-14-473. Effect of covenant not to bring an action; action to enforce lien; limitation; affidavit of payment.

(a) No release of the cause or causes of action or of any judgment thereon or any covenant not to bring an action thereon shall be valid or effectual against the lien created by Code Section 44-14-470 unless the holder thereof shall join therein or execute a release of the lien; and the claimant or assignee of the lien may enforce the lien by an action against the person, firm, or corporation liable for the damages or such person, firm, or corporation's insurer. If the claimant prevails in the action, the court may allow reasonable attorney's fees. The action shall be commenced against the person liable for the damages or such person's insurer within one year after the date the liability is finally determined by a settlement, by a release, by a covenant not to bring an action, or by the judgment of a court of competent jurisdiction.

(b) No release or covenant not to bring an action which is made before or after the patient was discharged from the hospital, nursing home, or provider of traumatic burn care medical practice or, with

respect to a physician practice, which is made after the patient first sought treatment from the physician practice for the injuries shall be effective against the lien perfected in accordance with Code Section 44-4-471, if such lien is perfected prior to the date of the release, covenant not to bring an action, or settlement unless consented to by the lien claimant; provided, however, that any person, firm, or corporation which consummates a settlement, release, or covenant not to bring an action with the person to whom hospital, nursing home, physician practice, or traumatic burn care medical practice care, treatment, or services were furnished and which first procures from the injured party an affidavit as prescribed in subsection (c) of this Code section shall not be bound or otherwise affected by the lien except as provided in subsection (c) of this Code section, regardless of when the settlement, release, or covenant not to bring an action was consummated.

(c) The affidavit shall affirm:

(1) That all hospital, nursing home, physician practice, or provider of traumatic burn care medical practice bills incurred for treatment for the injuries for which a settlement is made have been fully paid; and

(2) The county of residence of such affiant, if a resident of this state;

provided, however, that the person taking the affidavit shall not be protected thereby where the affidavit alleges the county of the affiant's residence and the lien of the claimant is at such time on file in the office of the clerk of the superior court of the county and is recorded in the name of the patient as it appears in the affidavit. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 4; Ga. L. 1982, p. 3, § 44; Ga. L. 2002, p. 1141, § 4; Ga. L. 2002, p. 1429, § 4; Ga. L. 2004, p. 394, § 4; Ga. L. 2006, p. 334, § 4/SB 306.)

The 2004 amendment, effective July 1, 2004, inserted "physician practice," throughout this Code section.

The 2006 amendment, effective July 1, 2006, in subsection (b), deleted "physician practice," following "nursing home," near the beginning, inserted "or, with respect to a physician practice, which is made after the patient first sought treatment from the physician practice for the injuries", substituted "in accordance with Code Section 44-4-471, if such lien is perfected prior to the date of the release, covenant not to bring an action, or settlement unless consented to by the lien claimant" for "in due time as provided in subsection (a) of this Code section, regardless of whether the release, covenant not to bring an action, or settlement was made prior to the time of the filing of the lien as specified in Code Sections 44-14-470 and 44-14-471" near the middle, and substituted "procures from the injured party" for "procures therefrom" near the end.

Law reviews. — For annual survey on insurance law, see 66 Mercer L. Rev. 93 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

JUDICIAL DECISIONS

Action filed before limitations period ran. — Hospitals' action to recover on liens related to medical treatment was not barred by the limitations period in O.C.G.A. § 44-14-473(a) as the statute of limitations began to run on the date that the release was executed, as that was the date liability was finally determined, and the action was filed less than one year after that date. Hosp. Auth. of Clarke County v. Geico Gen. Ins. Co., 294 Ga. 477, 754 S.E.2d 358 (2014).

Insurer's obligation to timeply pay settlement demand did not impermissibly conflict with duty to satisfy hospital's lien. — An injured party's time-limited demand on an insurer to settle the injured party's claim for policy limits, and a hospital's assertion of a lien for the injured party's care, did not place the insurer in the position of being required to make payments in excess of policy limits because the insurer could create a "safe harbor" from liability for a bad faith refusal to settle when (1) the hospital promptly settled a case involving clear liability and special damages exceeding policy limits, and (2) the sole reason for an inability to settle was an injured party's unreasonable refusal to assure satisfaction of outstanding hospital liens. Southern Gen. Ins. Co. v. Wellstar Health Sys., 315 Ga. App. 26, 726 S.E.2d 488 (2012).

Inclusion of lien language did not invalidate settlement agreement. — Trial court properly awarded summary judgment to plaintiffs to enforce a settlement agreement because inclusion of the statutory healthcare-provider lien affidavit release information did not constitute a counteroffer and did not alter the fact that a meeting of the minds has occurred with regard to the terms of the settlement. Sherman v. Dickey, 322 Ga. App. 228, 744 S.E.2d 408 (2013).

Hospital's lien was invalid. — Although contract provisions between the U.S. Department of Defense TRICARE health insurance program and a hospital allowed the filing of a hospital lien against a tortfeasor's insurer under O.C.G.A. § 44-14-470(b), the lien was invalid because other provisions of the contract negated any debt that could support it. MCG Health, Inc. v. Owners Ins. Co., 302 Ga. App. 812, 692 S.E.2d 72 (2010).

44-14-475. Effect of part on settlement before entry into hospital, nursing home, or traumatic burn care medical facility.

No settlement or release entered into or executed prior to the entry of the injured party into the hospital, nursing home, or facility which provides traumatic burn care medical practice or prior to the time the patient first sought treatment from the physician practice for the injuries shall be affected by or subject to the terms of this part. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 7; Ga. L. 2002, p. 1141, § 5; Ga. L. 2004, p. 394, § 5; Ga. L. 2006, p. 334, § 5/SB 306.)

The 2004 amendment, effective July 1, 2004, inserted "physician practice," near the middle of this Code section.

The 2006 amendment, effective July 1, 2006, deleted "physician practice," following "nursing home," near the middle, and inserted "or prior to the time the patient first sought treatment from the physician practice for the injuries" near the end.

44-14-476. No independent right of action.

This part shall not be construed to give any hospital, nursing home, physician practice, or provider of traumatic burn care medical practice referred to in this part an independent right of action to determine liability for injuries sustained by a person or firm. (Ga. L. 1953, Nov.-Dec. Sess., p. 105, § 8; Ga. L. 2002, p. 1141, § 6; Ga. L. 2004, p. 394, § 6.)

The 2004 amendment, effective July 1, 2004, inserted "physician practice," near the middle of this Code section.

Part 9

Veterinarians and Boarders of Animals

44-14-490. Lien for treatment, board, or care of animal; right to retain possession.

(a) Every licensed veterinarian shall have a lien on each animal or pet treated, boarded, or cared for by him or her while in his or her custody and under contract with the owner of the animal or pet for the payment of charges for the treatment, board, or care of the animal or pet; and the veterinarian shall have the right to retain the animal or pet until the charges are paid.

(b)(1) As used in this subsection, the term:

(A) "Charges" means:

(i) Any charges, fees, expenses, and reimbursements which have been contracted for, agreed to, or otherwise mutually acknowledged by written agreement, course of conduct, or understanding, including but not limited to:

(I) Board, care, services, and treatment of the animal or pet, whether provided by the operator or by a third party and incurred by the operator;

(II) Farrier and veterinary fees and expenses incurred by the operator for or on behalf of the boarded animal or pet; and

(III) Fees and expenses for transportation of the animal or pet; and

(ii) Late payment fees, returned check fees, and all costs of collection, including but not limited to reasonable attorney's fees and expenses of litigation and costs of sale.

Charges shall not include fees, expenses, or commissions of any kind relating to purchase, sale, or lease of such animal or pet, other than a sale pursuant to Code Section 44-14-491.

(B) "Facility for boarding animals or pets" shall include, but not be limited to, veterinary hospitals, boarding kennels, stables, livestock sales barns, and humane societies.

(2) Every operator of a facility for boarding animals or pets which facility is licensed by the Department of Agriculture, other than a licensed veterinarian, shall have a lien on each animal or pet in his or her care for the payment of all charges of such operator; and the operator of such a facility shall have the right to retain the animal or pet until the charges are paid in full.

(c) Any person granted a lien by this Code section may waive such lien in writing. (Ga. L. 1974, p. 330, § 1; Ga. L. 2005, p. 58, § 1/HB 201.)

The 2005 amendment, effective July 1, 2005, rewrote this Code section, which read: "Every licensed veterinarian and every operator of a facility for boarding animals or pets shall have a lien on each animal or pet treated, boarded, or cared for by them while in their custody and under contract with the owner of the animal or pet for the payment of charges for the treatment, board, or care of the animal or pet; and the veterinarian or operator of a facility shall have the right to retain the animal or pet until the charges are paid. Facilities for boarding animals or pets shall include, but not be limited to, veterinary hospitals, boarding kennels, stables, livestock sales barns, and humane societies."

JUDICIAL DECISIONS

Retaining animals until charges paid. — Trial court did not err in granting summary judgment in favor of the veterinarian because the owner of the dog agreed to have the veterinarian treat the dog for the parvo virus in exchange for payment of at least the estimated costs; the owner did not cite any evidence creating a genuine issue of material fact as to the accuracy or validity of any of the charges on the itemized bill; and the veterinarian acted properly in relying on the veterinary lien statute to retain the dog when the owner failed to pay the bills. Gomez v. Innocent, 330 Ga. App. 260, 765 S.E.2d 405 (2014).

Part 10

Miscellaneous Liens

44-14-511. Liens on offspring of stallions, jacks, bulls or boars; necessity of recordation; recording fee; priorities.

JUDICIAL DECISIONS

Foreclosure of lien on mare. — Trial court properly granted summary judgment pursuant to O.C.G.A. § 9-11-56 to colt possessors in a tortious interference with a contract claim by a horse trainer, wherein the trainer alleged that the trainer had a contract to keep the recently born colt in exchange for continued ser-

vices to the mare's owner; the court found that there was no showing that the possessors were aware of a contract regarding the ownership of the colt, the possessors had followed the necessary procedures for filing a financing statement under O.C.G.A. § 11-9-501 et seq., they had allegedly foreclosed on their lien on the mare by the time that they became aware of the trainer's claim, pursuant to O.C.G.A. § 44-14-490, and the trainer did not record a lien against the colt pursuant to O.C.G.A. § 44-14-511. Medlin v. Morganstern, 268 Ga. App. 116, 601 S.E.2d 359 (2004).

44-14-512. Lien for hauling lumber, stocks, or logs.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Logs and Timber, § 43.

44-14-518. Liens on aircraft or aircraft engines for labor and materials and for contracts of indemnity.

(a) Any person engaged in repair, storage, servicing, or furnishing supplies or accessories for aircraft or aircraft engines or providing contracts of indemnity for aircraft shall have a lien on such aircraft or aircraft engines for any reasonable charges therefor, including charges for labor, for the use of tools, machinery, and equipment, and for all parts, accessories, materials, oils, lubricants, storage fees, earned premiums, and other supplies furnished in connection therewith. Such lien shall be superior to all liens except liens for taxes, subject to compliance with subsection (b) of this Code section.

(b) Such lien may be asserted by the retention of the aircraft or aircraft engines, and if such lien is asserted by retention of the aircraft or aircraft engines, the lienor shall not be required to surrender the aircraft or the aircraft engine to the holder of a subordinate security interest or lien. When possession of the aircraft or aircraft engine is surrendered by the person claiming the lien, the person claiming the lien shall, within 90 days after such repair, storage, service, supplies, accessories, or contracts of indemnity are furnished:

(1) Provide written notice, subscribed and sworn to by such person or by some person in his or her behalf, giving a just and true account of the demands claimed to be due, with all just credits and the name of the person to whom the repair, storage, service, supplies, accessories, or contracts of indemnity were furnished, the name of the owner of the aircraft or aircraft engines, if known, and a description of the aircraft sufficient for identification, by personal delivery, certified mail, or statutory overnight delivery, return receipt requested, to the following:

(A) The registered owner and others holding recorded interests in the aircraft or aircraft engines at the addresses listed in the Federal Aviation Administration's Aircraft Registry; or

(B) If not a United States registered aircraft or if the aircraft engine is not subject to recordation by the Federal Aviation Administration, to the owner, if known, at his or her last known address, or, if not known, to the person to whom the repair, storage, service, supplies, accessories, or contracts of indemnity were furnished; and

(2) File such written notice for recording in the Federal Aviation Administration's Aircraft Registry in the manner prescribed by federal law under 49 U.S.C. Section 44107 for the filing of such liens for recordation, or, if not a United States registered aircraft or if the aircraft engine is not subject to recordation by the Federal Aviation Administration, with the Georgia Superior Court Clerks' Cooperative Authority or the appropriate recording authority, established by applicable state law, international treaty, or foreign law, in the manner prescribed for the filing of such liens for recordation. (Code 1981, § 44-14-518, enacted by Ga. L. 1994, p. 798, § 1; Ga. L. 2010, p. 776, § 2/HB 1147.)

The 2010 amendment, effective July 1, 2010, rewrote this Code section. See the editor's note for applicability.

Editor's notes. — Ga. L. 2010, p. 776, § 3, not codified by the General Assembly, provides that the amendment of this Code section shall apply to all liens filed on or after July 1, 2010.

Part 11

Foreclosure of Liens on Realty

44-14-530. Manner of foreclosure; attachment of lien; proceeds of judicial sale; trial of claim; damages; effect of delivery of possessions.

JUDICIAL DECISIONS

Mechanic's lien void if O.C.G.A. § 44-14-530 not strictly followed.

Denial of a builder's motion for partial summary judgment on a lien foreclosure claim was proper as a contract was a condition precedent to foreclosing a lien under O.C.G.A. § 44-14-530(a) and a fact issue remained as to whether there was a contract or that the parties assented to the contract. Dan J. Sheehan Co. v. Fairlawn on Jones Homeowners Ass'n, 312 Ga. App. 787, 720 S.E.2d 259 (2011).

PART 12

FORECLOSURE OF LIENS ON PERSONALTY

44-14-550. Manner of foreclosure; demand; forfeiture of lien; affidavit; notice; petition for and conduct of probable cause hearing; possession; bond; petition for full hearing; authorization of foreclosure; damages; limitation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
1. GENERAL APPLICABILITY
HEARING

General Consideration

1. General Applicability

Contractor for planting and picking cotton could assert lien. — Based on evidence that an independent contractor was hired to plant and pick cotton—not to oversee others while they completed the contract—the contractor met the burden under O.C.G.A. § 44-14-550 of showing reasonable cause that a valid debt existed to support the contractor's special lien. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283 (2009).

Hearing

Validity of lien to be determined at probable cause hearing. — As O.C.G.A. § 44-14-550 contemplated that at the initial probable cause hearing, the trial court would inquire as to whether the plaintiff had put forth facts necessary to constitute a laborer's lien and amount due, the trial court did not err in reviewing the facts of the case in order to determine whether there was probable cause to believe a laborer could validly assert a lien against a farmer's crop for the debt under O.C.G.A. § 44-14-381. Slappey v. Slappey, 296 Ga. App. 773, 676 S.E.2d 283 (2009).

PART 13

REGISTRATION OF LIENS FOR FEDERAL TAXES

44-14-572. When notices and certificates affecting tax liens entitled to be filed; certification by secretary of treasury.

JUDICIAL DECISIONS

Certification requirement in O.C.G.A. § 44-14-572 is invalid, as the Georgia General Assembly cannot dictate the requirements of federal tax lien notices. Johnson v. IRS, No. 2:04-CV-173, 2005 U.S. Dist. LEXIS 24935 (S.D. Ga. Sept. 30, 2005).

PART 14

BANKRUPTCY PROCEEDINGS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Warranty Deed Intended as Mortgage, 4 POF2d 567. Bankruptcy Action to Recover Preferential Pre-Petition Transfer of Property of Debtor under 11 U.S.C.A. § 547, 48 POF3d 159.

ARTICLE 9

LIS PENDENS

Law reviews. — For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

44-14-610. Necessity of recordation for operation of lis pendens as to real property.

Law reviews. — For annual survey of zoning and land use law, see 58 Mercer L. Rev. 477 (2006). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

JUDICIAL DECISIONS

Lis pendens not proper for investment right. — Right of first refusal to invest in a limited liability company's development of real estate held by an LLC member was not a sufficient interest for the filing of a lis pendens because the member's interest in the LLC was a right to invest in the development of real estate, which was an interest in personalty, not an interest in real estate. Meadow Springs, LLC v. IH Riverdale, LLC, 286 Ga. 701, 690 S.E.2d 842 (2010).

Cancelling notice of lis pendens.

Because a federal lawsuit seeking to restore the owners' land to its original condition and to address changes in the flow of water underneath the land "involved" the land for purposes of a lis pendens notice under O.C.G.A. § 44-14-610, the trial court properly denied a bank's motion to cancel the lis pendens in whole or in part. Colony Bank Southeast v. Brown, 275 Ga. App. 807, 622 S.E.2d 7 (2005).

Although a trial court improperly considered the merits of certain out-of-state litigation in determining that a lis pendens required cancellation, the cancellation was upheld as the out-of-state court no longer had subject matter jurisdiction over the Georgia property. Boca Petroco, Inc. v. Petroleum Realty II, LLC, 292 Ga. App. 833, 666 S.E.2d 12 (2008).

A lis pendens concerning real property in Georgia alleged to be involved in litigation in Florida should have been involuntarily cancelled. For there to be a valid lis pendens, the court before which the underlying litigation was filed had to have subject matter jurisdiction, and the Florida court lacked subject matter jurisdiction over the Georgia property. Petroleum Realty II v. Boca Petroco, Inc., 292 Ga. App. 896, 666 S.E.2d 49 (2008), aff'd, Boca Petroco, Inc. v. Petroleum Realty II, LLC., 285 Ga. 487, 678 S.E.2d 330 (2009).

Trial court properly removed a notice of lis pendens placed on certain real property that was the subject of a suit brought by a property investment company against various related business entities asserting claims for breach of contract,

fraud, punitive damages, attorney's fees, and declaratory judgment as the related business entities obtained summary judgment, which thereby entitled the entities to cancellation of the lis pendens notice. Triple Net Props., LLC v. Burruss Dev. & Constr., Inc., 293 Ga. App. 323, 667 S.E.2d 127 (2008).

Trial court erred in cancelling a record notice of lis pendens because it was alleged that the subject property was fraudulently transferred by a former partner to defeat the claims of the plaintiff and that the transfer should be set aside; thus, it could not be said that the subject property was not involved in the lawsuit. Meljon v. Sonsino, 325 Ga. App. 719, 753 S.E.2d 456 (2014).

Lis pendens as notice. — With respect to an objection to the debtor's motion to sell property free and clear of liens and other interests, one objector's claimed interest in a road was resolved by a state court order because the objector had actual and constructive knowledge of the state court litigation and the claims asserted therein by virtue of two lis pendens filed, and the objector's president's actual knowledge. In re Flyboy Aviation Props., LLC, 501 B.R. 828 (Bankr. N.D. Ga. 2013).

Litigation pending outside of Georgia involving Georgia property. — Lis pendens cannot be filed in Georgia to give notice of litigation pending outside of Georgia that involves the Georgia property. Thus, notices of lis pendens were invalid because a Florida court lacked subject matter jurisdiction over the properties located in Georgia. Boca Petroco, Inc. v. Petroleum Reality II, LLC., 285 Ga. 487, 678 S.E.2d 330 (2009).

Lis pendens invalid. — Trial court erred in granting a limited liability company and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the act of sending copies of a notice of lis pendens on the owner's property and a complaint against the owner to a bank did not fall under the absolute privilege of O.C.G.A. § 51-5-8 since the lis pendens was not valid. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Cited in Bayview Loan Servicing, LLC v. Baxter, 312 Ga. App. 826, 720 S.E.2d 292 (2011).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Lis Pendens, § 3.

44-14-612. Entry of dismissal, settlement, or final judgment.

JUDICIAL DECISIONS

Cancelling notice of lis pendens. — Although a trial court improperly considered the merits of certain out-of-state litigation in determining that a lis pendens required cancellation, the cancellation was upheld as the out-of-state court no longer had subject matter jurisdiction over the Georgia property. Boca Petroco, Inc. v. Petroleum Realty II, LLC, 292 Ga. App. 833, 666 S.E.2d 12 (2008).

Although O.C.G.A. § 44-14-612 now directs the clerk to indicate on the face of the recorded lis pendens notice a dismissal, settlement, or final judgment entered in the underlying action, no reversal was required based on the clerk's failure to do so because, following the appeal, the judgment releasing the lis pendens was final and no further appeal was possible. Therefore, any error was harmless. Arko v. Cirou, 305 Ga. App. 790, 700 S.E.2d 604 (2010).

Slander of title. — Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11, as the sellers failed to assert actionable claims where lis pendens filed

against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

CHAPTER 15

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS

Sec.
44-15-1. Short title.
44-15-2. Definitions.
44-15-3. Considerations and standard of conduct for institutions receiving gifts.
44-15-4. Management of institutional funds for endowment.
44-15-5. Delegation of management of funds.
44-15-6. Modification of restrictions.
44-15-7. Compliance with provisions; effective date.
44-15-8. Uniformity with law of other states.

Effective date. — This chapter became effective July 1, 2008.

Editor's notes. — Ga. L. 2008, p. 149, § 1, effective July 1, 2008, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 44-15-1 through 44-15-9, relating to management of institutional funds, and was based on Ga. L. 1984, p. 831, § 1; Ga. L. 1985, p. 149, § 44; Ga. L. 1990, p. 1471, § 3.

44-15-1. Short title.

This chapter shall be known and may be cited as the "Uniform Prudent Management of Institutional Funds Act." (Code 1981, § 44-15-1, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

44-15-2. Definitions.

As used in this chapter, the term:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund, or any part thereof, that, under the terms of a gift instrument, is not wholly

expendable by the institution on a current basis. The term shall not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) A person, other than an individual, organized and operated exclusively for charitable purposes;

(B) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term shall not include:

(A) Program related assets;

(B) A fund held for an institution by a trustee that is not an institution; or

(C) A fund in which a beneficiary who is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (Code 1981, § 44-15-2, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-3. Considerations and standard of conduct for institutions receiving gifts.

(a) Subject to the intent of a donor expressed in a gift instrument or any express written agreement between the donor and the institution,

an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest such fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances, considering the purposes, terms, distribution requirements, and other circumstances of the institutional fund.

(c) In managing and investing an institutional fund, an institution:

(1) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution and the institutional fund, and the skills reasonably available to the institution; and

(2) Shall make a reasonable effort to verify facts relevant to the management and investment of such fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(A) General economic conditions;

(B) The possible effect of inflation or deflation;

(C) The expected tax consequences, if any, of investment decisions or strategies;

(D) The role that each investment or course of action plays within the overall investment portfolio of such fund;

(E) The expected total return from income and the appreciation of investments;

(F) Other resources of the institution;

(G) The needs of the institution and such fund to make distributions and to preserve capital; and

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(2) Management and investment decisions about an individual asset shall not be made in isolation but rather in the context of the

institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the institutional fund and to the institution;

(3) An institution may invest in any kind of property or type of investment consistent with this Code section;

(4) An institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism, except as provided in this paragraph, as follows:

(A) The duty imposed by this paragraph shall not apply if the institution reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of such fund are better served without complying with the duty. For purposes of this paragraph, special circumstances shall include an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;

(B) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this paragraph to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limits or waives the duty; and

(C) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to the rebalancing of a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution or the institutional fund as necessary to meet other circumstances of the institution or the institutional fund and the requirements of this chapter; and

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that such person has special skills or expertise, has a duty to use those skills or expertise in managing and investing institutional funds. (Code 1981, § 44-15-3, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-4. Management of institutional funds for endowment.

(a) Subject to the intent of a donor expressed in the gift instrument or to any express written agreement between a donor and an institu-

tion, an institution may appropriate for expenditure or accumulate assets of an endowment fund as the institution determines shall be prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund shall be donor restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate assets, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) The duration and preservation of the endowment fund;

(2) The purposes of the institution and the endowment fund;

(3) General economic conditions;

(4) The possible effect of inflation or deflation;

(5) The expected total return from income and the appreciation of investments;

(6) Other resources of the institution; and

(7) The investment policy of the institution.

(b) To limit the authority to appropriate assets for expenditure or accumulation under subsection (a) of this Code section, a gift instrument shall specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only income, interest, dividends, or rents, issues, or profits, or to preserve the principal intact, or other words of similar meaning shall:

(1) Create an endowment fund of permanent duration, unless otherwise provided by the gift instrument for limiting the duration of such fund; and

(2) Not otherwise limit the authority to appropriate assets for expenditure or accumulation under subsection (a) of this Code section. (Code 1981, § 44-15-4, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-5. Delegation of management of funds.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care

that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) Selecting an agent;

(2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) of this Code section shall not be liable for the decisions or actions of an agent for the performance of a delegated function.

(d) By accepting the delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as otherwise authorized by law. (Code 1981, § 44-15-5, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-6. Modification of restrictions.

(a) If the donor or a donor's designee consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow an institutional fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of such fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of such fund. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of such fund or the restriction on the use of such fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General shall be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:

(1) The institutional fund subject to the restriction has a total value of less than $100,000.00;

(2) More than 20 years have elapsed since the institutional fund was established; and

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument. (Code 1981, § 44-15-6, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-7. Compliance with provisions; effective date.

Compliance with this chapter shall be determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight. This chapter applies to institutional funds existing on or established after July 1, 2008. As applied to institutional funds existing on July 1, 2008, this chapter governs only decisions made or actions taken on or after that date. This chapter shall not authorize electronic delivery of any legally required notice. (Code 1981, § 44-15-7, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

44-15-8. Uniformity with law of other states.

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (Code 1981, § 44-15-8, enacted by Ga. L. 2008, p. 149, § 1/HB 972.)

CHAPTER 16

UNIFORM ENVIRONMENTAL COVENANTS

Sec.
44-16-1. Short title.
44-16-2. Definitions.
44-16-3. Holders of environmental covenants; rights of agency; rules.
44-16-4. Requirements for environmental covenant.
44-16-5. Enforcement of environmental convenant.
44-16-6. Environmental covenant restrictions.
44-16-7. Validation of environmental covenant.
44-16-8. Recording of amendments or termination of environmental convenant.
44-16-9. Limitation of environmental covenant.
44-16-10. Amendment or termination; interest in environmental covenant not affected by amendment; role of court.
44-16-11. Liability for violation and enforcement of environmental covenant.
44-16-12. Maintenance of registry.
44-16-13. Rules and regulations; fees.
44-16-14. Electronic signatures and delivery.

Effective date. — This chapter became effective July 1, 2008.

44-16-1. Short title.

This chapter may be known as and may be cited as the "Uniform Environmental Covenants Act." (Code 1981, § 44-16-1, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-2. Definitions.

As used in this chapter, the term:

(1) "Activity and use limitations" means restrictions or obligations created under this chapter with respect to real property.

(2) "Agency" means the Environmental Protection Division of the Department of Natural Resources or any federal agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.

(3) "Common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(4) "Environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations.

(5) "Environmental response project" means a plan or work performed for environmental remediation of real property and conducted:

(A) Under a federal or state program governing environmental remediation of real property;

(B) Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(C) Under a state voluntary clean-up program.

(6) "Holder" means the grantee of an environmental covenant as specified in subsection (a) of Code Section 44-16-3.

(7) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, political subdivision, agency, or instrumentality, or any other legal or commercial entity.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (Code 1981, § 44-16-2, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-3. Holders of environmental covenants; rights of agency; rules.

(a) Any person, including a person that owns an interest in the real property, the agency, or a municipality, county, consolidated government, or other unit of local government, may be a holder. An environmental covenant may identify more than one holder. The interest of a holder shall be an interest in real property.

(b) A right of an agency under this chapter or under an environmental covenant, other than a right as a holder, shall not be considered an interest in real property.

(c) An agency shall be bound by any obligation it assumes in an environmental covenant, but an agency shall not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant shall be bound by the obligations the person assumes in the covenant, but signing the covenant shall not change obligations, rights, or protections granted or imposed under law.

(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) An interest that has priority under other law shall not be affected by an environmental covenant unless the person that owns the interest subordinates that interest to the covenant;

(2) The provisions of this chapter shall not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the covenant;

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association; and

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but shall not by itself impose any affirmative obligation on the person with respect to the environmental covenant. (Code 1981, § 44-16-3, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-4. Requirements for environmental covenant.

(a) An environmental covenant shall:

(1) State that the instrument is an environmental covenant executed pursuant to this chapter;

(2) Contain a legally sufficient description of the real property subject to the covenant and the name of the owner of the fee simple of the real property subject to such covenant at the time such covenant is executed;

(3) Describe the activity and use limitations on the real property;

(4) Identify every holder;

(5) Be signed by the agency, every holder, and, unless waived by the agency, every owner of the fee simple of the real property subject to such covenant; and

(6) Identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a) of this Code section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it, including any:

(1) Requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for

building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(2) Requirements for periodic reporting describing compliance with the covenant;

(3) Rights of access to the property granted in connection with implementation or enforcement of the covenant;

(4) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(5) Limitation on amendment or termination of the covenant in addition to those contained in Code Sections 44-16-9 and 44-16-10; and

(6) Rights of the holder in addition to the right to enforce the covenant pursuant to Code Section 44-16-11.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the covenant.

(d) The agency shall not sign the environmental covenant without confirming that the people or entities listed in paragraphs (1) through (6) of subsection (a) of Code Section 44-16-7 have been served with a copy of the proposed final text of the environmental covenant at least 30 days prior to the agency signing such covenant. (Code 1981, § 44-16-4, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-5. Enforcement of environmental convenant.

(a) An environmental covenant that complies with this chapter runs with the land.

(b) An environmental covenant that is otherwise effective shall be valid and enforceable even if:

(1) It is not appurtenant to an interest in real property;

(2) It can be or has been assigned to a person other than the original holder;

(3) It is not of a character that has been recognized traditionally at common law;

(4) It imposes a negative burden;

(5) It imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) The benefit or burden does not touch or concern real property;

(7) There is no privity of estate or contract;

(8) The holder dies, ceases to exist, resigns, or is replaced; or

(9) The owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded before July 1, 2008 shall not be invalid or unenforceable because of any of the limitations on enforcement of interests described in subsection (b) of this Code section or because it was identified as an easement, servitude, deed restriction, or other interest. This chapter shall not apply in any other respect to such an instrument.

(d) This chapter shall not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state. (Code 1981, § 44-16-5, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2008, "July 1, 2008" was substituted for "the effective date of this chapter" in the first sentence of subsection (c).

44-16-6. Environmental covenant restrictions.

This chapter shall not authorize a use of real property that is otherwise prohibited by zoning, by ordinance, by local law, by general law, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict uses of real property which are otherwise authorized by zoning, by ordinance, by local law, or by general law. (Code 1981, § 44-16-6, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-7. Validation of environmental covenant.

(a) A copy of an environmental covenant shall be provided in the manner required by the agency and shall establish proof of service to:

(1) Each person that signed the covenant;

(2) Each person holding a recorded interest in the real property subject to the covenant;

(3) Each person in possession of the real property subject to the covenant;

(4) Each municipality, county, consolidated government, or other unit of local government in which real property subject to the covenant is located;

(5) Each owner in fee simple whose property abuts the property subject to the environmental covenant; and

(6) Any other person the agency requires.

(b) The validity of an environmental covenant shall not be affected by failure to provide a copy of the covenant as required under this Code section. (Code 1981, § 44-16-7, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-8. Recording of amendments or termination of environmental convenant.

(a) An environmental covenant and any amendment or termination of the covenant shall be recorded in every county in which any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in subsection (c) of Code Section 44-16-9, an environmental covenant shall be subject to the laws of this state governing recording and priority of interests in real property. (Code 1981, § 44-16-8, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-9. Limitation of environmental covenant.

(a) An environmental covenant shall be perpetual, which shall be stated in such covenant, unless it is:

(1) By its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) Terminated by consent pursuant to Code Section 44-16-10;

(3) Terminated pursuant to subsection (b) of this Code section;

(4) Terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) Terminated or modified in an eminent domain proceeding, but only if:

(A) The agency that signed the covenant is a party to the proceeding;

(B) All persons identified in subsections (a) and (b) of Code Section 44-16-10 are given notice of the pendency of the proceeding; and

(C) The court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in subsection (a) and (b) of Code Section 44-16-10 have been given notice, may terminate the covenant or reduce its burden on the real property subject to the covenant. The agency's determination or its failure to make a determination upon request of the current owner of the fee simple of the real property or by any affected member of the public shall be subject to review pursuant to Article 1 of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) Except as otherwise provided in subsections (a) and (b) of this Code section, an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(d) An environmental covenant may not be extinguished, limited, or impaired by application of Code Sections 44-5-60 and 44-5-168. (Code 1981, § 44-16-9, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-10. Amendment or termination; interest in environmental covenant not affected by amendment; role of court.

(a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) The agency;

(2) The current owner of the fee simple of the real property subject to the covenant;

(3) Each person that originally signed the covenant, unless the person waived in a signed record the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) Except as otherwise provided in paragraph (2) of subsection (d) of this Code section, the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest shall not be affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken pursuant to a governmental reorganization, assignment of an environmental covenant to a new holder shall be an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) A holder may not assign its interest without consent of the other parties; and

(2) A holder may be removed and replaced by agreement of the other parties specified in subsection (a) of this Code section.

(e) A court of competent jurisdiction may fill a vacancy in the position of holder. (Code 1981, § 44-16-10, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-11. Liability for violation and enforcement of environmental covenant.

(a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:

(1) A party to the covenant;

(2) The agency;

(3) Any person to whom the covenant expressly grants power to enforce;

(4) Any owner in fee simple whose property abuts the property subject to the environmental covenant, if harm occurs or is reasonably likely to occur;

(5) A person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; or

(6) A municipality, county, consolidated government, or other unit of local government in which the real property subject to the covenant is located.

(b) This chapter shall not limit the regulatory authority of the agency under law other than with respect to an environmental response project.

(c) A person shall not be responsible for or subject to liability for environmental remediation solely because such person has the right to enforce an environmental covenant. (Code 1981, § 44-16-11, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-12. Maintenance of registry.

The agency may establish and maintain a registry that contains all environmental covenants and any amendment or termination of such covenants. The registry may also contain any other information concerning environmental covenants and the real property subject to them

which the agency considers appropriate. The registry, if established, shall be a public record for purposes of Article 4 of Chapter 18 of Title 50. (Code 1981, § 44-16-12, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-13. Rules and regulations; fees.

The agency may establish rules and regulations for implementing this chapter and may provide for fees for utilizing this chapter. (Code 1981, § 44-16-13, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)

44-16-14. Electronic signatures and delivery.

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) but shall not modify, limit, or supersede Section 101 of such Act (15 U.S.C. Section 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of such Act (15 U.S.C. Section 7003(b)). (Code 1981, § 44-16-14, enacted by Ga. L. 2008, p. 1168, § 1/HB 1132.)